

102

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 796

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

VS.

UNITED STATES REALTY AND IMPROVEMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1940
CERTIORARI GRANTED APRIL 1, 1940

United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter

of

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Debtor,

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellee.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellant,

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

In Proceedings
For an
Arrangement
Under Chapter XI
of the Bankruptcy Act

TRANSCRIPT OF RECORD.

UPON APPEAL FROM THREE ORDERS DATED JULY 28,
1939 OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK



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United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter

of

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Debtor,

In Proceedings

For an

Arrangement

Under Chapter XI
of the Bankruptcy Act

1

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellee.

Consolidated Record
on Appeal

2

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Appellant,

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

3

Statement Under Rule 13.

On May 31, 1939, the Debtor filed with the United States
District Court for the Southern District of New York a

Statement Under Rule 13.

petition under Chapter XI of the Bankruptcy Act proposing an Arrangement. By an order dated May 31, 1939 and made by Judge Vincent L. Leibell, the said District Court found that the petition had been properly filed under Section 322 of Chapter XI and continued the Debtor in possession.

A meeting of creditors pursuant to Chapter XI was held before Judge Vincent L. Leibell on June 28, 1939, was continued on July 7, 1939, and was closed on July 10, 1939. Hearings before Judge Vincent L. Leibell were held on July 20, 1939, July 27, 1939, and July 28, 1939.

The Debtor filed an application for confirmation of the Arrangement on July 7, 1939.

In a memorandum dated July 5, 1939, served on all the parties at the direction of Judge Vincent L. Leibell, submitted on July 7, 1939, and thereafter filed on July 28, 1939, the Securities and Exchange Commission notified the parties that it had obtained leave of the Court to appear in the proceeding as amicus curiae, to present its views therein as set forth in an "Outline of Matters to be Discussed by the Securities and Exchange Commission", attached to said memorandum, the conclusions therein being:

(a) that the order of the Court dated May 31, 1939, finding that the Debtor's petition was properly filed under Chapter XI of the Bankruptcy Act, should be vacated;

(b) that confirmation of the Debtor's proposed Arrangement should be denied as not for the best interests of creditors; as not fair and equitable, or feasible; and as not proposed in good faith; and

(c) that the petition and the proceeding should be dismissed.

Statement Under Rule 13.

By order to show cause dated July 18, 1939, there was brought on for hearing on July 20, 1939, a motion of the Securities and Exchange Commission for leave to intervene in the proceeding for the purpose of moving the Court (a) to dismiss the Debtor's petition for an Arrangement, (b) to deny confirmation of the Debtor's Arrangement, and (c) to dismiss the proceeding instituted by the Debtor under Chapter XI of the Bankruptcy Act. Judge Vincent L. Leibell granted the motion for intervention by an order made and entered on July 28, 1939.

By order to show cause dated July 18, 1939, there was brought on for hearing on July 20, 1939, motions of the Securities and Exchange Commission (a) to vacate the order of May 31, 1939, finding the Debtor's petition to have been properly filed under Section 322 of Chapter XI, (b) to dismiss the Debtor's petition, (c) to deny confirmation of the Debtor's proposed Arrangement, and (d) to dismiss the proceeding under Chapter XI. Judge Vincent L. Leibell denied these motions in all respects by an order made and entered on July 28, 1939.

On July 28, 1939, over objection by the Securities and Exchange Commission, Judge Vincent L. Leibell made an order referring the proceeding to Hon. John E. Joyce, a Referee in Bankruptcy. At the time of the taking of these appeals, there had been no proceedings before the said Referee but all of the proceedings had been before the Judge.

On August 3, 1939, the Securities and Exchange Commission filed its notice of appeal from the following orders:

1. Order of July 28, 1939 denying the motions of the Securities and Exchange Commission (a) to vacate the order of May 31, 1939, (b) to dismiss the Debtor's petition, (c)

Statement Under Rule 13.

to deny confirmation of the Debtor's proposed Arrangement, and (d) to dismiss the proceeding under Chapter XI; and

10 2. Order of July 28, 1939 referring the proceeding to a Referee in Bankruptcy.

On August 8, 1939, the Debtor filed a notice of appeal from the order of July 28, 1939 granting the motion of the Securities and Exchange Commission for leave to intervene in the proceeding.

By stipulation dated September 6, 1939 and the order thereon made by Circuit Judge Augustus N. Hand, filed September 16, 1939, the records on appeal were consolidated.

White and Case, Esqs., appeared as attorneys for the United States Realty and Improvement Company, the Debtor.

11 Edmund Burke, Jr. and J. Anthony Panuch, Esqs., appeared as attorneys for the Securities and Exchange Commission, Intervenor.

Davis, Polk, Wardwell, Gardiner and Reed, Esqs., appeared as attorneys for the Guaranty Trust Company of New York, as Mortgagee under First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 of Trinity Buildings Corporation of New York.

12 Simpson, Thacher and Bartlett, Esqs., appeared as attorneys for James A. Beha, Peter E. Bennett, Lloyd E. Lubetkin and Eugene W. Potter, as Trinity Buildings Corporation (111-115 Broadway) Bondholders' Committee, Intervenor.

Ralph Montgomery Arkush, Esq., appeared as attorney for Peter Grimm, Charles F. Simmons, Erwin Stugard, Leonard A. Wales and Guy Wheeler, as Trinity Buildings Corporation of New York Mortgage Certificateholders Committee, Intervenor.

Statement Under Rule 13.

William E. Bardusch, Esq., appeared as attorney for Ralph W. Earl and Donald M. Halsted, on behalf of Holders of Share Certificates in First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 of Trinity Buildings Corporation of New York, Intervenor.

**Debtor's Petition for Arrangement,
Filed May 31, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter

of

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

Debtor.

In Proceedings
for an
Arrangement.
No. 74023

*To the Honorable the Judges of the United States District
Court for the Southern District of New York:*

The petition of the United States Realty and Improvement Company (hereinafter referred to as the "Debtor") respectfully states:

1. The Debtor is a corporation duly organized and existing under the laws of the State of New Jersey and has had its principal place of business at 111 Broadway, New York, N. Y., within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition, than in any other judicial district, to wit, the Debtor has maintained such principal place of business for in excess of ten years. The Debtor was incorporated on May 26, 1904.

2. The Debtor is a person who could become a bankrupt under Section 4 of the Bankruptcy Act and is not a muni-

Debtor's Petition for Arrangement.

cial, railroad, insurance or banking corporation or a building and loan association.

3. The nature of the business conducted by the Debtor is the management and ownership of investments in real estate. No bankruptcy proceeding, initiated by a petition for or against the Debtor, is now pending.

4. The Debtor owns all of the capital stock of Trinity Buildings Corporation of New York, which is indebted to the Debtor as of December 31, 1938 in the amount of \$10,442,482.99. Trinity Buildings Corporation of New York on June 1, 1919 issued its First Mortgage Twenty-Year Five and One-Half Per Cent Sinking Fund Gold Loan, due June 1, 1939, for \$7,000,000, executing and delivering to Guaranty Trust Company of New York, as Mortgagee, its Bond and First Mortgage to secure the same. Share Certificates therein were issued by Guaranty Trust Company of New York and sold to the Debtor which in turn executed a Guarantee thereof and sold such certificates to The National City Company, which in turn sold them to the public.

5. The Debtor on June 1, 1919 guaranteed as aforesaid the due and punctual payment by Trinity Buildings Corporation of New York of the principal and interest of its First Mortgage Twenty-Year Five and ~~One-Half Per Cent~~ Sinking Fund Gold Loan dated June 1, 1919 and due June 1, 1939, and the sharecertificates issued therein. A copy of such Mortgage and Guarantee is annexed hereto as Exhibit A.

6. The principal amount of such Loan and sharecertificates presently outstanding is \$3,710,500, the remainder having been retired by operation of the sinking fund. Such

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Debtor's Petition for Arrangement.

Loan matures on June 1, 1939. Trinity Buildings Corporation of New York will be unable to make payment thereon and the Debtor will be unable to meet its Guarantee thereof and is therefore unable to meet its debts as they mature. All interest on the certificates has been paid to December 1, 1938 and real estate taxes on the premises have been paid to date. However, under the provisions of the Bond and First Mortgage and of the Mortgage Moratorium Law of the State of New York, sinking fund payments of principal have been postponed in amounts aggregating \$597,144.32 as of December 31, 1938.

7. The Debtor proposes herewith an Arrangement under Chapter XI, Section 322 of the Bankruptcy Act, which is contained in Exhibit B annexed hereto and hereby made a part hereof, entitled "Amended Modification Plan and Arrangement of Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Sinking Fund Gold Loan, due June 1, 1939, and Guarantee thereof" dated May 1, 1939 (hereinafter referred to as the "Arrangement"), which provides for the modification and alteration of the rights of one class of unsecured creditors, namely, holders of the aforesaid sharecertificates.

8. Such Guarantee constitutes a debt within the definition of Section 307(2) of the Bankruptcy Act and holders of the aforesaid sharecertificates constitute creditors within the definition of Section 307(1) of the Bankruptcy Act.

9. No other creditors or class of creditors are affected by the Arrangement because the Debtor proposes to and is able to pay all of its debts, secured and unsecured, as they mature. All other funded debt of the Debtor is secured and the only

Debtor's Petition for Arrangement.

other unsecured debt besides the aforesaid Guarantee is set forth in the schedules annexed hereto and is the result of current operations of the Debtor, and the Debtor proposed to pay such debts, secured and unsecured, as they mature.

25

10. On or about March 15, 1939 the Debtor mailed or caused to be mailed to all known holders of sharecertificates, a copy of a Modification Plan and Arrangement, dated March 15, 1939. Thereafter certain holders of sharecertificates, without solicitation on the part of the Debtor or Trinity Buildings Corporation of New York, proposed certain amendments to such Modification Plan and Arrangement, which were adopted by the Debtor and are reflected in the Arrangement proposed herewith and entitled "Amended Modification Plan and Arrangement", dated May 1, 1939; such Arrangement has been mailed to all known holders of sharecertificates along with the form of proof of claim and acceptance annexed hereto as Exhibit C. The holders of sharecertificates which proposed such amendments are financial institutions which, for the most part, made independent investigations of the Debtor, of Trinity Buildings Corporation of New York, and of the mortgaged premises, and, for the most part, have executed acceptances thereto. In the aggregate, proofs of claims and acceptances in writing of the Arrangement have been received from holders of sharecertificates representing \$1,357,000 in amount of outstanding sharecertificates.

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11. There are presently outstanding \$3,710,500 principal amount of sharecertificates; with the exception of \$136,500 principal amount all are bearer certificates. The Debtor and Guaranty Trust Company of New York, as Mortgagee, have diligently endeavored to ascertain the number of holders

Debtor's Petition for Arrangement.

28 of bearer sharecertificates. Upon information and belief and based upon such investigation and information tax returns, the aggregate number of holders of sharecertificates, both bearer and registered, is 899.

29 12. Guaranty Trust Company of New York, as Mortgagee, is merely Trustee for holders of sharecertificates entitled to rights under the Guarantee. The Debtor is advised by counsel, believes and therefore alleges that in computing the number and amount of acceptances and the number and amount of proofs of claim filed with respect to the Guarantee, any proof of claim filed by Guaranty Trust Company of New York, as Mortgagee, on behalf of all creditors entitled to rights under the Guarantee, be not considered for the purposes of the Arrangement and its acceptance but only for the purposes of distribution under the Arrangement.

13. The schedule hereto annexed marked Exhibit D and verified by the Executive Vice-President of the Debtor contains a full and true statement of all of its debts, and so far as it is possible to ascertain, the names and places of residence of its creditors and such further statements concerning said debts as are required by the Bankruptcy Act.

30 14. The schedule hereto annexed marked Exhibit E and verified by the Executive Vice-President of the Debtor contains an accurate inventory of all of its property, real and personal, and such further statements concerning said property as are required by the provisions of the Bankruptcy Act.

15. The statement hereto annexed marked Exhibit F and verified by the Executive Vice-President of the Debtor contains a full and true statement of all of its executory con-

Debtor's Petition for Arrangement.

tracts as required by the provisions of the Bankruptcy Act. The Arrangement provides that none of the executory contracts of the Debtor are to be affected under or by it and none are to be rejected in these proceedings.

31

16. The statement hereto annexed marked Exhibit G and verified by the Executive Vice-President of the Debtor contains a full and true statement of its affairs as required by the provisions of the Bankruptcy Act.

17. The Arrangement which has already been accepted in writing by a substantial number of creditors accepting thereby provides inter alia as follows:

"(1) The sole creditors of Realty to be affected by the Arrangement will be holders of certificates and Guaranty Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee. All other creditors of Realty are not to be affected by the Arrangement. Therefore, creditors of Realty for the purposes of the Arrangement and its acceptance are divided into classes as follows:

22

(i) Holders of certificates and Guaranty Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee;

(ii) All other creditors.

33

(2) The acceptance is also to constitute a proof of claim in the Arrangement proceedings. Proofs of claim are not to be filed by any other creditors since no other creditors will be affected by the Arrangement. Such acceptances are to be delivered by holders of certificates

Debtor's Petition for Arrangement.

to Trinity for filing in Court at or before the first meeting of creditors.

(3) There is not to be any deposit of the consideration to be distributed to creditors or money to pay debts which have priority, since all debts, with the exception of the liability under the Guarantee, are to be paid as they become due, including debts incurred prior to the institution of the Chapter XI proceeding and debts incurred during the pendency thereof.

(4) No trustee or receiver is to be appointed and Realty is to remain in possession and control of its assets as debtor in possession. Realty is to continue its operations, meeting its obligations as they become due and paying its officers and other expenses as if no Chapter XI proceeding were pending.

(5) No appraiser or appraisers are to be appointed by the Court to prepare any inventory or appraisal of the property of Realty.

(6) None of the executory contracts of Realty are to be affected under or by the Arrangement since none are to be rejected thereunder.

(7) The Court will retain jurisdiction of Realty in the Chapter XI proceeding at least until (i) the consummation of the Arrangement (which is entirely independent of the institution or consummation of the plan of Reorganization for Trinity under the Burchill Act); or (ii) confirmation of the Plan under the Burchill Act for Trinity; whichever is sooner.

Debtor's Petition for Arrangement.

(8) Realty may apply to the Court in the Chapter XI proceeding for an injunction and stay until final decree of the commencement or continuation of suits or other proceedings against it with respect to the Guarantee in order that no litigation interfere with the progress of the Arrangement.

37

(9) The institution, confirmation or consummation of the Arrangement shall not (i) constitute a waiver or release of any and all rights and defenses which Realty is presently entitled to under the so-called Mortgage Moratorium and Deficiency Judgment Statutes of the State of New York; or (ii) permit acceleration of the maturity of the principal of the Bond and Mortgage or any other action not in conformity with the Plan by holders of certificates."

35

18. Since the sole creditors to be affected by the Arrangement will be those entitled to rights under the Guarantee, the Debtor proposes that the Court for the purposes of the Arrangement and its acceptance, fix the division of creditors into classes as follows:

- (i) Creditors entitled to rights under the Guarantee, and
- (ii) All other creditors (not affected by the Arrangement).

39

19. The business of the Debtor consisting merely of management and ownership of investments in real estate, it is believed that no trustee or receiver of its assets should be appointed, because no purpose would be served thereby, and the expenses of this proceeding would be materially in-

Debtor's Petition for Arrangement.

40 creased, and it might permit creditors not affected by the Arrangement to accelerate the maturity of their indebtedness. The Debtor proposes to continue its operations, meeting its obligations as they mature, with the exception of the obligation under the Guarantee which the Debtor proposes to meet or cause to be met in accordance with the terms of the same as modified by the Arrangement. The Debtor proposes to continue to pay its officers and directors in the same manner as it has in the past as evidenced by a schedule of such salaries and fees contained in Exhibit H annexed hereto and hereby made a part hereof.

41 20. Since only creditors entitled to rights under the Guarantee are to be affected by the Arrangement, the Debtor proposes that a stay and injunctive relief be granted only with respect to suits or actions or legal proceedings concerning the Guarantee, and that any other suits or actions or legal proceedings be not stayed or enjoined.

21. The Debtor proposes that it be exempted from the provisions of Rule XI-8 for two months from the date of this Petition, and that a report and summary of the operations of its business be filed at the termination of these proceedings, or if not terminated at such time, no later than the 1st day of August, and monthly thereafter.

42 22. Annexed hereto as Exhibit H is an affidavit required by Rule XI-2 of the Court.

23. Annexed hereto as Exhibit I is a form of notice which the Debtor proposes to send to all known creditors and to publish once in such newspaper as the Court may determine, within three days of the entry of this order.

Debtor's Petition for Arrangement.

WHEREFORE, the Debtor respectfully prays that the Court make an Order approving the Petition for an Arrangement etc. substantially in the form submitted herewith.

43

UNITED STATES REALTY
AND IMPROVEMENT COMPANY

By Edwin J. Beinecke
President

ATTEST:

Frederick M. Sanders
Secretary

Corporate seal

44

[Verification]

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Debtor's Petition for Arrangement.

6

Exhibit A.**BOND, MORTGAGE AND GUARANTEE**

46

[as abridged by stipulation dated September 13, 1939]

* * * * *

The Bond of Trinity Buildings Corporation of New York.**TRINITY BUILDINGS CORPORATION
OF NEW YORK.****First Mortgage Twenty Year Five and One-half
Per Cent. Sinking Fund Gold Loan.**

47

Know All Men by These Presents:

That Trinity Buildings Corporation of New York, a corporation duly organized and existing under the laws of the State of New York, hereinafter termed the "Corporation", does hereby acknowledge itself to be indebted to Guaranty Trust Company of New York, a trust company duly organized and existing under the laws of the State of New York, hereinafter termed the "Trust Company", in the sum of Seven Million Dollars (\$7,000,000), which sum said Corporation does hereby covenant to pay to said Trust Company, its successors and assigns, at the principal office of said Trust Company in the Borough of Manhattan, City of New York, on the first day of June, 1939, in gold coin of the United States, of the standard of weight and fineness of June 1st, 1919, with interest thereon, to be computed from the first day of June, 1919, at the rate of five and one-half per centum (5½%) per annum, and to be paid in like gold coin, semi-

48

Debtor's Petition for Arrangement: Exhibit A.

annually on the first day of December next ensuing the date hereof, and semi-annually thereafter.

AND THE CORPORATION DOES HEREBY FURTHER COVENANT that it will pay the aforesaid principal sum, and the interest thereon, without deduction for any tax, assessment or governmental charge (other than succession and inheritance taxes, state income taxes, and any Federal income tax in excess of two per cent. (2%) of such interest) which the Corporation or the Trust Company may be required or authorized to pay thereon or to retain therefrom under any present or future law of the United States of America, or of any State, County, municipality or other taxing authority therein; and that it, the said Corporation, will pay in behalf of any holder or owner of any share in this bond and in the mortgage given to secure the same any Federal income tax to the extent of, but not exceeding, two per cent. (2%) of such interest which the Corporation or the Trust Company may lawfully pay at the source.

AND IT IS HEREBY EXPRESSLY AGREED that the whole of the said principal sum shall become due at the option of the Trust Company after default for sixty days in the payment of any interest hereon, or after default for sixty days in any payment into the Sinking Fund provided for in the mortgage given to secure this bond, or after default for ninety days after notice and demand in the payment of any tax, assessment or water rates upon the premises described in said mortgage, or after any other default, or upon the happening of any event by which, in any case, under the terms of said mortgage, the said principal sum may or shall become due and payable.

AND IT IS FURTHER EXPRESSLY AGREED that all of the covenants made by the Corporation in its mortgage

Debtor's Petition for Arrangement: Exhibit A.

bearing even date herewith, made and executed to Guaranty Trust Company of New York, to secure this bond, and collateral hereto, upon the premises therein described, known as the Trinity Building, at No. 111 Broadway, and the United States Realty Building, at No. 115 Broadway, both in the Borough of Manhattan, City of New York, are hereby made part of this instrument.

IN WITNESS WHEREOF, the Corporation, in pursuance of due authority, and of all and every legal right and power in it vested, has caused these presents to be executed and its corporate seal to be hereunto affixed and duly attested, by its proper officers thereunto duly authorized, as of the first day of June, one thousand nine hundred and nineteen.

TRINITY BUILDINGS CORPORATION
OF NEW YORK,
By A. C. Mau,
President.

(Corporate Seal)

Attest:

A. J. Flohr,
Secretary.

[Acknowledgment]

Debtor's Petition for Arrangement: Exhibit A.

.

The Mortgage executed by Trinity Buildings Corporation of New York covering The Trinity and United States Realty Buildings to secure its bond.

55

THIS MORTGAGE, dated the first day of June, one thousand nine hundred and nineteen, between Trinity Buildings Corporation of New York, a corporation duly organized and existing under the laws of the State of New York, hereinafter termed the "Mortgagor", and Guaranty Trust Company of New York, a trust company duly organized and existing under the laws of the State of New York, hereinafter termed the "Mortgagee", whose principal place of business is at No. 140 Broadway, in the Borough of Manhattan of the City of New York;

56

WITNESSETH: That to secure the payment of an indebtedness in the sum of Seven Million Dollars (\$7,000,000) to be paid to the Mortgagee at its principal office in the Borough of Manhattan of the City of New York, on the first day of June, 1939, in gold coin of the United States, of the standard of weight and fineness of June 1, 1919, with interest thereon to be computed from the first day of June, 1919, at the rate of five and one-half per centum (5½%) per annum, and to be paid in like gold coin, semi-annually, on the first day of December next ensuing the date hereof, and semi-annually thereafter, according to a certain bond or obligation for the said principal sum and interest executed and delivered by the Mortgagor to the Mortgagee and bearing even date herewith; and also for and in consideration of one dollar, paid by the Mortgagee, the receipt whereof is hereby acknowledged.

57

The Mortgagor does hereby grant, release and mortgage unto the Mortgagee, and its successors and assigns forever,

.

Debtor's Petition for Arrangement: Exhibit A.

TO HAVE AND TO HOLD the above granted premises into the Mortgagee, its successors and assigns forever.

PROVIDED, ALWAYS, that until the happening of a default under the terms of said bond or of this mortgage, and the continuance of such default for a period, if any, therein or herein specified, the Mortgagor shall be suffered and permitted to retain actual possession of the said mortgaged premises, and to manage, operate and use the same, and to collect, receive, use and enjoy the earnings, income, rents, issues and profits thereof; and

PROVIDED, FURTHER, that if the Mortgagor shall well and truly pay, or cause to be paid, the principal sum of the indebtedness mentioned in said bond, and the interest thereon, at the time and in the manner therein and herein provided, and shall also pay, or cause to be paid, all other sums payable hereunder by the Mortgagor, and shall well and truly keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of these presents, then and in that case these presents and the estate, rights, title and interest hereby granted, shall cease, determine and become void; otherwise these presents shall continue and remain in full force and virtue.

And the Mortgagor, for itself, its successors and assigns, does hereby covenant and agree to and with the Mortgagee, for the benefit of the Mortgagee, its successors and assigns, and the holders or registered owners for the time being of any certificates representing shares in said bond and this mortgage (hereinafter referred to as the "certificates") which the Mortgagee may issue and reissue from time to time, as follows:

1. That the Mortgagor will and punctually pay or cause to be paid the principal sum of the aforesaid bond.

Debtor's Petition for Arrangement: Exhibit A.

and the interest thereon, at the times and in the manner therein and herein provided; without deduction from such principal or interest for any tax, assessment or governmental charge (other than succession and inheritance taxes, state income taxes, and any Federal income tax in excess of two per cent. (2%) of such interest), which the Mortgagor or the Mortgagee may be required or authorized to pay thereon or to retain therefrom under any present or future law of the United States of America, or of any State, county, municipality or other taxing authority therein; and that it, the said Mortgagor, will pay in behalf of any holder or owner of any share in said bond and this mortgage any Federal income tax to the extent of, but not exceeding, two per cent. (2%) of such interest, which the Mortgagor or the Mortgagee may lawfully pay at the source.

2- That the Mortgagor from time to time will pay and discharge all taxes, assessments, water rates and other charges which may be assessed or become liens on the mortgaged premises, and all taxes, assessments and other charges (other than succession and inheritance taxes, state income taxes, and any Federal income tax in excess of two per cent. (2%) of the interest) which may be assessed or become liens on the lien or interest of the Mortgagee therein, so that the lien and priority of this mortgage shall be fully preserved at the cost of the Mortgagor, without expense to the Mortgagee or the holders or registered owners of the certificates; and, whenever called upon to do so, the Mortgagor will furnish to the Mortgagee satisfactory proofs of the payment of any such taxes, assessments, water rates or other charges, and, in default of the payment of any thereof when the same shall become due and payable, the Mortgagee in its discretion, without notice to or demand on the Mortgagor, may pay the same, and any amount so paid shall be

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Debtor's Petition for Arrangement: Exhibit A.

repaid by the Mortgagee to the Mortgagor with interest thereon, without notice or demand, and until such repayment, the same shall be a lien on the mortgaged premises and shall be secured by the said bond and this mortgage.

* * * * *

11. That to provide a Sinking Fund for the reduction from time to time of the indebtedness hereby secured by the purchase and retirement or redemption of said certificates issued and to be issued by the Mortgagee, the Mortgagor will pay to Guaranty Trust Company of New York, or its successors, in the capacity of Sinking Fund Trustee, the quarterly sum of fifty thousand dollars (\$50,000), in gold coin of the United States of the standard of weight and fineness existing June 1, 1919 (subject to increase or reduction of any such quarterly payment as hereinafter provided), within thirty (30) days after the expiration of each quarterly period ending respectively August 31st, November 30th, February 28th and May 31st, in each year, provided, however, that for any quarter in which the "residual net profits", as hereinafter defined, are less than fifty thousand dollars (\$50,000), the Mortgagor may postpone such part of the quarterly payment to the Sinking Fund as shall not be in excess of one-half of the difference between fifty thousand dollars (\$50,000) and such "residual net profits", and provided, further, that the amount so postponed in any quarter shall not exceed twenty-five thousand dollars (\$25,000), so that not less than the sum of twenty-five thousand dollars (\$25,000) shall be paid into the Sinking Fund for any such quarter, and provided, further, that any amounts so postponed from time to time shall accumulate as arrears and shall be added to the quarterly payments successively becoming due, until all such arrears are fully paid, and provided, fur-

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ther, that for any quarter or successive quarters in which the "residual net profits" are in excess of fifty thousand dollars (\$50,000) the Mortgagor shall pay into the Sinking Fund, in addition to the regular quarterly payment or payments of fifty thousand dollars (\$50,000), an amount equal to one-half of the balance of such "residual net profits" remaining after the payment of said regular quarterly payment, or so much of said amount as shall be necessary to liquidate said arrears in full.

The fact that in any given quarter the said "residual net profits" are less than fifty thousand dollars (\$50,000) shall be established only by a report of public accountants satisfactory to the said Sinking Fund Trustee, which shall be filed with the said Sinking Fund Trustee within the said period of thirty (30) days after the end of any such quarter. Said report shall show the gross income derived or accruing from the operation of the mortgaged premises during such quarter and shall show as offsets only the following charges and no others, to wit: (1) the actual current operating expenses, including repairs, maintenance and a fair proportionate part of the cost of alterations for tenants, but excluding depreciation, commissions on rentals, charges for general management and salaries of executive officers, except a fair salary to the superintendent or general manager, (2) a proportionate part of the real estate taxes, water rates and assessments for the year, (3) a proportionate part of insurance premiums, bad debts, losses and claims for damages for injuries to persons or property not compensated for by insurance, (4) a proportionate part of the annual interest charge on the indebtedness hereby secured, and (5) an arbitrary allowance of twenty-five thousand dollars (\$25,000) on account of the Sinking Fund; and the balance remaining after offsetting said charges against the gross income

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shall be conclusively deemed to be the "residual net profits" of the Mortgagor for the quarter in question for the purposes of the Sinking Fund. Said report shall also show any arrears due the Sinking Fund accumulated from previous quarters, and the Mortgagor shall continue to file with the Sinking Fund Trustee similar reports showing the state of the Sinking Fund Account within thirty (30) days after the end of each succeeding quarter until all such arrears shall have been liquidated in full.

The Mortgagor may at any time make voluntary payments in any amount into the Sinking Fund, but such payments shall be in addition to and shall not be credited against the stipulated payments above specified.

The Sinking Fund Trustee, as often as it shall deem proper, and at least once in each period of six months, (commencing after the expiration of the first period of six months) shall publish, once in each calendar week for three successive weeks in two daily newspapers of general circulation in the Borough of Manhattan of the City of New York, a notice stating that certificates will be purchased by the Sinking Fund Trustee to an amount not exceeding the principal amount named in such notice and inviting written offers to be submitted to the Sinking Fund Trustee within a period to be fixed in said notice for the sale of certificates at prices to be named in such offers; and the Sinking Fund Trustee, to the extent of the moneys in its possession available therefor, shall purchase certificates so offered at the lowest prices at which they may be offered and at which the largest amount of certificates can be purchased under the terms of said offers, provided that no such offers shall be accepted by the Sinking Fund Trustee at prices exceeding 104% of the face value of such certificates and accrued interest up to and including June 1, 1921, and thereafter at prices not

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exceeding 103% of such face value and accrued interest up to and including June 1, 1929, and thereafter at prices not exceeding 102% of such face value and accrued interest up to and including June 1, 1934, and thereafter at prices not exceeding 101% of such face value and accrued interest. Should there be two or more offers to sell certificates at the same price aggregating more than the amount of the moneys available after the acceptance of all offers at lower prices, such offers shall, if possible under their terms, and as nearly as possible, be accepted pro rata.

If the offers received in pursuance of the said notice within forty-five (45) days after the first publication thereof, and acceptable and accepted as aforesaid, shall not be sufficient to exhaust the said moneys in the possession of the Sinking Fund Trustee, the latter may thereafter purchase other certificates in any other manner which it may deem advisable, at not exceeding the prices above specified and to the extent of the moneys so available.

Whenever after the expiration of ninety (90) days from the date of the first publication of said notice, there shall remain in the hands of the Sinking Fund Trustee the sum of at least fifty thousand dollars (\$50,000), which the Sinking Fund Trustee has not been able to expend in the purchase of certificates as aforesaid, the Sinking Fund Trustee shall draw by lot for redemption on the next succeeding semi-annual interest date an amount of certificates sufficient to absorb such unapplied moneys, as nearly as may be, at 104% of the face value thereof and accrued interest up to and including June 1, 1924, and thereafter at 103% of the face value thereof and accrued interest up to and including June 1, 1929, and thereafter at 102% of the face value thereof and accrued interest up to and including June 1, 1934, and thereafter at 101% of the face value thereof and accrued interest.

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76 The Sinking Fund Trustee shall thereupon publish in two daily newspapers of general circulation in the Borough of Manhattan of the City of New York, once a week for three successive calendar weeks; the first publication to be not less than thirty (30) days before such semi-annual interest date, a notice of intention to redeem the certificates so drawn, specifying the same by their serial numbers, and requiring that they be presented for payment and redemption on said date at the principal office of said Sinking Fund Trustee in the Borough of Manhattan of the City of New York. A notice of redemption shall also be mailed by the Sinking Fund Trustee at least thirty (30) days prior to said interest date, addressed to the respective registered owners of any such certificates so drawn, at the addresses appearing upon the registry books.

77 Notice of redemption having been thus given the certificates so called for redemption shall on the date designated in said notice become due and payable at the said principal office of the Sinking Fund Trustee at the said redemption price and accrued interest, and, upon the presentation and surrender thereof, with, in the case of certificates in coupon form, all interest coupons maturing on and subsequent to said date, such certificates shall be paid and redeemed at the said redemption price and accrued interest to said date, and after said date the certificates so called shall cease to bear further interest. All certificates purchased or redeemed by the Sinking Fund Trustee for the Sinking Fund shall be cancelled and shall be retained by the Mortgagee and no certificates in lieu thereof shall thereafter be issued.

78 Payments made by the Mortgagor into the Sinking Fund, either as hereinbefore required, or voluntarily, or as proceeds of property taken under the power of eminent domain, or to secure the release of any part of the mortgaged premises,

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shall not be considered or treated as payments on account of or in reduction of the indebtedness hereby secured, but such moneys shall be deemed to be additional collateral security for said indebtedness hereby secured until applied and expended by the Sinking Fund Trustee in the purchase or redemption of certificates as hereinabove provided. Nevertheless all certificates so purchased or redeemed and cancelled by the Sinking Fund Trustee, and all certificates so called for redemption, the holders or registered owners of which may have failed to present the same for payment on the redemption date, shall be considered and credited to the Mortgagor as payments on account of and in reduction of the principal of said indebtedness hereby secured, at their face value, and shall be so noted on the bond.

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* * * * *

The Guarantee executed by United States Realty and Improvement Company.

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

GUARANTEE

Know All Men by These Presents, That

Whereas, Trinity Buildings Corporation of New York has executed and delivered to Guaranty Trust Company of New York, its certain bond for its First Mortgage Twenty-Year Five and One-Half Per Cent. Gold Loan in the principal sum of seven million dollars (\$7,000,000), dated June 1, 1919, and payable on the first day of June, 1939, with interest at the rate of five and one-half per cent. per annum, and has executed and delivered to said Trust Company, to secure the

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82 payment of said bond, a mortgage upon the premises and buildings known as the Trinity Building and the United States Realty Building in the City of New York; and

Whereas, the said Trust Company as the holder of said bond and mortgage has issued a series of certificates representing pro rata shares in said bond and mortgage in the aggregate principal sum of seven million dollars (\$7,000,000); and

83 Whereas, the undersigned United States Realty and Improvement Company, a corporation of the State of New Jersey, hereinafter termed the "Realty Company" has purchased the entire issue of said certificates, and intends to resell the same, and, as a condition of such resale, and in order to induce the purchasers to accept and pay for said certificates, has agreed to guarantee unconditionally the said bond and mortgage and said Trinity Buildings Corporation of New York.

84 NOW, THEREFORE, in consideration of the premises, and FOR VALUE RECEIVED, United States Realty and Improvement Company, for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, its successors and assigns, and to the holders and registered owners from time to time of the said certificates for shares in said bond and mortgage, the due and punctual payment by Trinity Buildings Corporation of New York of the principal and interest of its said bond and mortgage, dated June 1, 1919, as and when the same shall become due and payable whether at maturity or by declaration or otherwise, and of the sinking fund payments and other sums and charges therein required to be paid by it, and as well the due performance and observance by said Trinity

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Buildings Corporation of New York of all the terms, conditions and covenants in said bond and mortgage contained on its part to be performed and observed; all demands and notice or notices of default or defaults being hereby waived.

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AND IT IS HEREBY FURTHER COVENANTED, STIPULATED AND AGREED, that in the event of default by said Trinity Buildings Corporation of New York under the terms of said bond and mortgage, and as often as any such default shall occur, no delay or omission by said Guaranty Trust Company of New York, its successors and assigns, or of the holders and registered owners for the time being of said certificates, to exercise any right, power or privilege consequent upon any such default, and no waiver of any such default or its consequences, shall in any wise affect or discharge the unconditional liability and responsibility of the undersigned Realty Company upon this guarantee.

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IN WITNESS WHEREOF, the undersigned Realty Company has caused these presents to be executed by its proper officers thereunto duly authorized, and its corporate seal to be hereunto affixed and duly attested, as of the first day of June, 1919.

United States Realty and Improvement Company

By Paul Starrett,
President

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(Corporate Seal)

Attest:

R. G. Babbage

Secretary

*Debtor's Petition for Arrangement.***Exhibit B.**

AMENDED

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MODIFICATION PLAN AND ARRANGEMENT

of

TRINITY BUILDINGS CORPORATION OF NEW YORK**FIRST MORTGAGE**

**TWENTY-YEAR FIVE AND ONE-HALF PER CENT.
SINKING FUND GOLD LOAN, DUE JUNE 1, 1939,
AND GUARANTEE THEREOF.**

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INTRODUCTORY STATEMENT

On June 1, 1919 Trinity Buildings Corporation of New York (hereinafter referred to as "Trinity") executed and delivered to Guaranty Trust Company of New York, as Mortgagee, its Bond and First Mortgage in the principal amount of \$7,000,000 to secure its First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan, due June 1, 1939. Share certificates therein were issued by Guaranty Trust Company of New York. Such First Mortgage covers the following properties:

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- (a) The Trinity Building, consisting of a parcel of land at No. 111 Broadway, New York, N. Y., on which is erected a twenty-one story office building, and
- (b) The United States Realty Building, consisting of a parcel of land at No. 115 Broadway, New York, N. Y., on which is erected a twenty-one story office building.

United States Realty and Improvement Company (hereinafter referred to as "Realty"), the holder of all of the

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outstanding capital stock of Trinity, executed and delivered to Guaranty Trust Company of New York, as Mortgagee, a Guarantee of such Bond and First Mortgage. Trinity owes Realty an unsecured debt in the amount of \$10,442,482.99 as of December 31, 1938.

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Through the operation of the sinking fund the principal amount of the outstanding certificates has been reduced to \$3,710,500. However, under the provisions of the Bond and First Mortgage and of the Mortgage Moratorium Law of the State of New York sinking fund payments of principal have been postponed in amounts aggregating \$597,144.32 as of December 31, 1938. All interest on the certificates has been paid to December 1, 1938, and real estate taxes on the premises to June 30, 1939, have been paid.

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Beginning with the year 1931 the rental income from the premises decreased steadily. The acute business recession which developed in the latter part of the year 1937 caused a greatly reduced demand for office space in the financial district of New York, seriously affecting the occupancy of the buildings and the rate of rental obtainable for space therein. As a result of the foregoing and of severe competition caused by overproduction of office space in the financial district and the shrinkage of the securities business, the income from the mortgaged premises has been insufficient to meet operating expenses, taxes and interest on the certificates for the past several years.

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The premises were assessed by the City of New York for tax purposes for the year 1938 at \$11,225,000, resulting in the payment of \$328,892.50 in real estate taxes for such year. The premises have been assessed for the year beginning July 1, 1939 at \$11,175,000; applications are pending for

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a material reduction of this assessment. The total income of Trinity for the year 1938 was \$915,029.49, whereas the total expenses (other than interest, depreciation and taxes) amounted to \$433,606.37, leaving, after deduction of taxes, only \$152,530.62 available for interest on the certificates. No improvement in existing conditions or in earnings is expected in the immediate future. Balance sheets as of December 31, 1938, and income statements for the last three years for both Trinity and Realty are annexed.

Although the Mortgage matures on June 1, 1939, in the opinion of counsel the provisions of the Mortgage Moratorium Law of New York State prevent any foreclosure or action on the Bond or Guarantee for principal, so long as interest and taxes are paid. Even if there were a default in interest or taxes permitting an action for principal on the Bond or on the Guarantee, the fair market value of the premises (believed to be well in excess of the amount of the Mortgage) could, in the opinion of counsel, be established as a set-off under the provisions of the New York statutes; in addition in foreclosure proceedings with respect to principal such fair market value could be offset against any claim for a deficiency judgment. Therefore, in the opinion of counsel, if foreclosure with respect to principal were instituted and such offset were established, Realty would by operation of law be released from further liability on its Guarantee. Such Mortgage Moratorium expires on January 1, 1940, and such Deficiency Judgment statutes expire on July 1, 1939, but it is believed that the latter will be extended.

Because of a predicted further decrease in earnings of the buildings for the year 1939 and the present conditions affecting real estate generally in the financial district of New York City where the premises are situated, Realty and Trinity

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hereby offer an "Amended Modification Plan and Arrangement" dated May 1, 1939, whereby the maturity of the Mortgage and of the Guarantee are to be extended and their terms modified.

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EXPLANATORY STATEMENT

Since there are two obligations to be dealt with under the Amended Modification Plan and Arrangement (hereinafter referred to as the "Plan", the "Arrangement" or the "Plan of Reorganization"), namely, the primary obligation of Trinity on its Bond and First Mortgage and the secondary obligation of Realty on its Guarantee, it is desirable to have two separate proceedings, the first, under Chapter XI of the Federal Bankruptcy Act for Realty in order to modify its Guarantee in accordance with the Plan, and the second, under the New York State Burchill Act (Sections 121-123 of the Real Property Law), for Trinity in order to modify the terms of its Bond and Mortgage. It is proposed in the first instance to modify the Guarantee of Realty as an independent transaction by an Arrangement under Chapter XI of the Bankruptcy Act, and thereafter, in the event such Arrangement is confirmed by the Court, to modify the obligation of Trinity by a reorganization under the Burchill Act so as to conform Trinity's obligation to the Guarantee as modified.

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The Burchill Act provides for a foreclosure of the Mortgage and the transfer of the properties to a New Company. It is contemplated that Guaranty Trust Company of New York, as Mortgagee, will be requested to institute proceedings thereunder after the Arrangement of Realty under Chapter XI is confirmed by the Court. Upon confirmation of the Arrangement, Realty will either execute and deliver a modified Guarantee to Guaranty Trust Company of New York,

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as Mortgagee, or upon the confirmation of the Plan of Reorganization under the Burchill Act will guarantee the bonds of the New Company, which bonds will take the place of the present certificates. Although the Amended Modification Plan and Arrangement is herein set forth as one plan for both the Bond and Mortgage of Trinity and the Guarantee thereof of Realty, two separate proceedings will be necessary for its complete consummation; further, although under the Plan the institution of the Burchill Act proceeding by Trinity will be dependent upon confirmation of the Arrangement under Chapter XI, such Arrangement for Realty is entirely independent of the Burchill Act reorganization for Trinity and will stand as an accomplished fact regardless of whether or not the primary obligation of Trinity is modified under the terms of the Plan. In any event, upon confirmation of the Arrangement, the Guarantee will be modified as herein set forth. The promulgation of the Plan, if not consummated, shall not constitute a waiver of the rights of Trinity or Realty or both to any and all rights granted under the statutes of the State of New York with respect to Mortgage Moratoria and deficiency judgments, nor of any rights of Guaranty Trust Company of New York, as Mortgagee.

TERMS OF PLAN

A—As to Bond and First Mortgage of Trinity and Shares
Therein

1—Security

There shall be no change in the physical security behind the present certificates. In the event the Plan is consummated under the Burchill Act with respect to the primary obligation of Trinity, the present certificates shall be con-

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verted into registered First Mortgage Bonds (hereinafter referred to as "New Bonds") issued under an Indenture with Guaranty Trust Company of New York, as Trustee, or some other trustee (hereinafter referred to as the "corporate Trustee") and secured by a first mortgage on the premises, the premises to be conveyed to a New Company which shall execute such Indenture. All New Bonds shall be fully registered.

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2—Principal Amount

There shall be no change in the principal amount (\$3,710,500) of the Mortgage. In the event the Burchill Act reorganization with respect to the primary obligation of Trinity is consummated, holders of present certificates shall receive par for par in New Bonds.

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3—Interest

The interest payment dates shall be changed from December 1 and June 1 to January 1 and July 1 and the interest rate shall be changed so that from and after December 1, 1938, the indebtedness shall bear fixed interest at the rate of 3% per annum (hereinafter referred to as "fixed interest"), and additional interest as hereinafter specified (hereinafter referred to as "additional interest") from the available net earnings after deposits in the Improvement Fund hereinafter described, which additional interest shall at maturity have equalled an amount equivalent to the sum of 1% per annum for the period December 1, 1938 to July 1, 1944 and 2% per annum for the period July 1, 1944 to maturity of the principal amount of outstanding New Bonds.

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Such interest shall be payable as follows:

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- (a) 3% per annum fixed interest payable on July 1, 1939, and semi-annually thereafter;
- (b) Additional interest shall be payable annually in respect of the preceding calendar year on March 10 in each year (beginning with March 10, 1940) on the New Bonds and shall consist of all available net earnings for such year as hereinafter described (after deduction of any deposit in the Improvement Fund hereinafter described), but the amount of additional interest shall not be in excess of an amount equal at the end of such year to 1% per annum from December 1, 1938 and 2% per annum from July 1, 1944 of the principal amount of outstanding New Bonds, less the aggregate of any amounts theretofore paid as additional interest. Additional interest shall be payable only in integral percentage amounts of $\frac{1}{4}$ of 1%, or any multiple thereof, of the principal amount of New Bonds then outstanding. On July 1, 1949 as additional interest for the period January 1, 1949 to July 1, 1949, there shall be payable, *absolutely whether or not earned*, an amount equal to the sum of 1% per annum for the period December 1, 1938 to July 1, 1944 and 2% per annum for the period July 1, 1944 to maturity of the principal amount of outstanding New Bonds, less the aggregate of any amounts theretofore paid as additional interest.

Under the present Revenue Act, interest on the New Bonds will be subject to Federal Income Tax without credit for the 2% heretofore paid by Trinity.

The interest payment to be due July 1, 1939 shall cover the seven months period from December 1, 1938 to July 1, 1939.

*Debtor's Petition for Arrangement: Exhibit B.**Improvement Fund*

In the event the Plan is consummated under the Burchill Act, all available net earnings (as hereinafter described) of the New Company for each calendar year, until and including the year 1948, but not in excess of \$50,000 for each year, shall be, on or before March 10 of the succeeding year, deposited in a special account with the corporate Trustee and be known as the "Improvement Fund". Such Improvement Fund shall be employed at such times, in such manners and for such purposes as the Board of Directors of the New Company may direct, but only upon the written consent of the corporate Trustee, for improvements, betterments and additions to the mortgaged premises. If in any year, so long as any New Bonds are outstanding, fixed interest is not earned thereon (in accordance with sound principles of accounting), the New Company shall be entitled to call upon the corporate Trustee to pay such interest for such year from any funds at the time on deposit in the Improvement Fund. Further, upon the written consent of the corporate Trustee, funds at any time on deposit in the Improvement Fund may be requisitioned by the Board of Directors of the New Company and applied to the sinking fund hereinafter described: provided, however, that the sinking fund requirements hereinafter described shall not be credited with any Improvement Fund moneys so applied. If in any year the full \$50,000 is not available for the Improvement Fund from the available net earnings hereinafter described, there shall be no requirement that any amounts not earned and deposited in the Improvement Fund in such year be deposited therein from available net earnings of succeeding years. The Improvement Fund shall not become operative unless and until the Plan under the Burchill Act is consummated. Any funds

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remaining in the Improvement Fund at the maturity of the New Bonds shall be employed to redeem New Bonds or to purchase the same in the open market for retirement, and upon the payment of all New Bonds outstanding, the balance, if any, shall be repaid to the New Company:

5—Maturity

To be extended to July 1, 1949.

6—Redemption, Sinking Fund and Dividend Limitation

In the event the Plan is consummated under the Burchill Act, the New Company shall have the right at any time on thirty days' notice to redeem any or all of the New Bonds at 100% plus (a) unpaid fixed interest and (b) additional interest calculated to the date of redemption less the aggregate of any amounts theretofore paid as additional interest. Until such time as the principal amount of outstanding New Bonds shall have been reduced to \$2,500,000 all of the available net earnings (as hereinafter described) for each calendar year after deduction of (a) deposits in the Improvement Fund and (b) additional interest calculated to the close of such calendar year, shall be set aside in cash in a separate account on March 10 in each year as and for a sinking fund and employed by the New Company to redeem New Bonds or to purchase the same in the open market for retirement; provided, however, that in no event shall the setting aside of such moneys as and for a sinking fund reduce, as of the close of the preceding calendar year, the net current assets or cash of the New Company below \$50,000. (Any moneys deposited or to be deposited for such year in the Improvement Fund or moneys set aside as and for a sinking fund shall not be considered current assets or cash for the purposes of the foregoing calculation of net current assets or cash.) No

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dividends whatsoever shall be paid by the New Company until such time as the principal amount of outstanding New Bonds shall have been reduced to \$2,500,000 and thereafter no dividends shall be paid in any year in excess of an amount equal to amounts set aside in such year as and for a sinking fund to redeem New Bonds or to purchase the same in the open market for retirement; provided, however, that in no year, so long as any of the New Bonds remain outstanding, shall dividends paid by the New Company exceed \$50,000. All New Bonds purchased through the sinking fund shall be cancelled and shall not be reissued.

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7—Guarantee.

In the event the Arrangement under Chapter XI is confirmed, Realty shall unconditionally guarantee the due and punctual payment by Trinity, or the New Company, as the case may be, of *principal and interest* on the Bond and Mortgage as modified hereunder or on the New Bonds, as the case may be. The obligation of Realty as modified by the Arrangement shall be a Guarantee of principal with a maturity of July 1, 1949 and of fixed and additional interest as herein described. *The Guarantee of Realty shall be unconditionally and irrevocably modified in the event the Arrangement under Chapter XI of the Bankruptcy Act is confirmed*, regardless whether or not (a) the Burchill Act proceeding is instituted, (b) the Plan of Reorganization thereunder is approved by the Court, or (c) such Plan is consummated. A copy of the Guarantee in its proposed revised form is annexed hereto as Exhibit A.

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8—Salaries of Officers and Directors

In the event the Plan is consummated under the Burchill Act, the Indenture providing for the New Bonds shall pro-

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vide that the aggregate salaries of the officers and directors of and paid by the New Company shall not exceed in any year, so long as any of the New Bonds are outstanding, a sum equivalent to one percent (1%) of the gross income of the New Company for such year; but employees regularly engaged in the management or operation of the mortgaged property shall not be prohibited from acting as officers or directors of the New Company and from receiving salaries for such services as employees not subject to this limitation.

9—Amendments

The Indenture providing for the New Bonds and the Guarantee as modified under the Plan, shall contain provisions that any terms of either, including, without limitation, extension of the maturity or reduction of the interest rate, may be modified upon the written consent of holders of $66 \frac{2}{3}\%$ or more in principal amount of certificates or New Bonds, as the case may be, then outstanding; provided, however, that holders of 20% or more in principal amount of certificates or New Bonds, as the case may be, then outstanding, do not dissent in writing thereto. Outstanding certificates or New Bonds, as the case may be, held by Realty or Trinity, or any subsidiary of either, shall not be so voted and shall not be included in the determination of outstanding certificates or New Bonds, as the case may be. Any such modifications shall be binding on all holders of certificates or New Bonds, as the case may be.

B—As to Other Obligations of Trinity and Realty

None of such obligations shall be affected by the Plan. The New Company, upon consummation of the Burchill Act reorganization, shall assume all obligations of Trinity except

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(a) the Bond and Mortgage and (b) the above-described indebtedness owing to Realty, and will receive all unmortgaged assets of Trinity.

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C—As to Common Stock of Trinity

Realty shall retain its present Common Stock interest in Trinity but upon consummation of the Burchill Act reorganization, shall receive all of the capital stock of the New Company.

EFFECTIVE DATE OF PLAN

The effective date of the Plan shall be December 1, 1938, as of which date all of the foregoing action in so far as practicable shall be taken. The New Bonds and the modified Guarantee shall be dated as of December 1, 1938, and shall bear interest under the Plan from such date. All modifications of rights and interests herein described shall take place in so far as practicable as of December 1, 1938.

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COMPUTATION OF EARNINGS

The net earnings of the New Company for calculating the amounts payable for the Improvement Fund and for additional interest (herein referred to as "available net earnings") shall be determined for each calendar year. (The first such computation, however, shall be made for the thirteen months period December 1, 1938 to December 31, 1939.) The available net earnings for each such annual period shall be the net income determined by deducting from gross income for such period calculated on an accrual basis according to good accounting practice the following items:

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- (a) Operating expenses paid and accrued, including, without limiting the generality of the foregoing, wages,

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supplies, gas, electricity, steam, telephone, maintenance, repairs, replacements, changes or alterations required by tenants or required by any public authority or required by any insurance underwriters or board of underwriters, and losses and damages not compensated by insurance or otherwise, and commissions payable to brokers for leases, irrespective of their duration; expenses of reasonable salaries and other expenses in maintaining the corporate organization; fees and compensation of transfer agents and registrars; bad debts; legal and other expenses incurred in the business or in connection with the buildings; legal expenses incurred in the collection of rents, controversies and litigation, and accounting fees and expenses; and reasonable provision for doubtful accounts. *Nothing in this paragraph (a) contained shall be deemed to authorize the deduction, for the purpose of determining available net earnings, of any charge for depreciation or obsolescence, but without prejudice, however, to the right of the New Company to claim any such deduction in connection with any tax return or tax liability.* Where the cost of repairs, replacements, changes or alterations referred to in this paragraph (a) may be paid for in instalments over more than one annual period or where such costs may be financed by the making of loans so payable, the same may be distributed instead of being deducted in one annual period and such deduction may, at the option of the New Company, be made in each annual period, regardless of whether or not by reason of such distribution over annual periods charges for interest or penalties may be incurred;

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- (b) Payments of and accruals for all real estate, income, social security, franchise, undistributed profits taxes and all other taxes whatsoever without limitation; for assessments and water rents; for insurance and for interest on debts of or loans to the New Company; 127
- (c) Accruals for fixed interest on the New Bonds;
- (d) Payment, to the extent not reimbursed by Realty as hereinafter set forth, of reorganization expenses which at the option of the New Company may be amortized over a period not exceeding five years.

For the purpose of computation of available net earnings, no profit shall be recognized by the New Company or included as income for such purpose which may arise or accrue by virtue of the purchase or retirement of New Bonds at less than the principal amount thereof. 128

Such available net earnings shall be determined in accordance with the foregoing by a firm of certified public accountants of recognized standing to be selected by the Board of Directors of the New Company and to be satisfactory to the corporate Trustee. The New Company shall deliver to the corporate Trustee on or before March 1 in each year, beginning on March 1, 1940, a statement certified to by such firm of certified public accountants showing the amount of available net earnings of the New Company for the preceding year ending December 31 determined in accordance with the foregoing and the figures and reasonable detail upon which the computation thereof is based. Such statements shall be available to holders of New Bonds at the offices of the New Company and at the office of the corporate Trustee. 129

*Debtor's Petition for Arrangement: Exhibit B.***EXPENSES**

130 All expenses in connection with the Plan both with respect to the proceeding under Chapter XI of the Federal Bankruptcy Act and the proceeding under the New York State Burchill Act will be paid, respectively, by Realty and Trinity or the New Company, as the case may be. A major portion of such expenses will be subject to judicial approval. Realty, however, will reimburse Trinity for expenses paid by it up to a maximum of \$25,000.

**ALTERATIONS OR MODIFICATIONS OF OR
ABANDONMENT OF PLAN**

131 Trinity and Realty severally reserve the right at any time before the consummation of the Plan to propose alterations or modifications thereof which unless materially and adversely affecting the interest of certificateholders shall be binding on all certificateholders who shall have prior thereto accepted the Plan. Whether or not any of such alterations or modifications shall materially and adversely affect the interest of certificateholders shall be subject to a finding by the Court.

In addition, Trinity and Realty severally reserve the right to abandon the Plan at any time prior to its consummation.

132

METHOD OF CONSUMMATION OF PLAN

As hereinabove set forth the Plan which is an Arrangement as to Realty will be effected in the first place under the provisions of Chapter XI of the Federal Bankruptcy Act with respect to the Guarantee of Realty. Upon the confirmation of the Arrangement for Realty under the aforesaid Chapter XI (which will stand as an independent transaction irrespective of the consummation of the Plan with respect to Trinity) it is contemplated that Guaranty Trust Company of New York, as Mortgagee, will be requested to institute a fore-

Debtor's Petition for Arrangement: Exhibit B.

closure under the New York State Burchill Act in order to consummate the Plan with respect to the obligation of Trinity on its Bond and Mortgage and the certificates therein. Acceptances of holders of certificates will constitute both an acceptance of the Arrangement under the aforesaid Chapter XI and of the Plan of Reorganization under the Burchill Act.

133

Guaranty Trust Company of New York, as Mortgagee, under the Plan shall be requested to bid at the foreclosure sale a minimum of \$100,000 for the premises and a maximum amount of the principal amount of the Mortgage, plus accrued interest, taxes and other charges thereunder, subject to such variations in said sums as the Court may direct. Trinity and Realty severally reserve the right to apply to the Court that said maximum amount be increased by the indebtedness owing by Trinity to Realty (in the principal amount as of December 31, 1938 of \$10,442,482.99), such indebtedness to be assigned to Guaranty Trust Company of New York, as Mortgagee, to protect it in bidding such increased amount if authorized by the Court. In any event, Guaranty Trust Company of New York, as Mortgagee, shall be directed in the acceptance of the Plan to bid for the premises, if necessary, up to the maximum amount herein set forth or such other maximum amount as may be fixed by the Court.

134

The following provisions are also included in the Plan for further defining rights and for simplifying the procedure to be followed:

135

A—With respect to the Arrangement for Realty

- 1—The sole creditors of Realty to be affected by the Arrangement will be holders of certificates and Guaranty

Debtor's Petition for Arrangement: Exhibit B.

136 Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee. All other creditors of Realty are not to be affected by the Arrangement. Therefore, creditors of Realty for the purposes of the Arrangement and its acceptance are divided into classes as follows:

- (i) Holders of certificates and Guaranty Trust Company of New York, as Mortgagee, being all those entitled to rights under the Guarantee;
- (ii) All other creditors.

137 2—The acceptance is also to constitute a proof of claim in the Arrangement proceedings. Proofs of claim are not to be filed by any other creditors since no other creditors will be affected by the Arrangement. Such acceptances are to be delivered by holders of certificates to Trinity for filing in Court at or before the first meeting of creditors.

138 3—There is not to be any deposit of the consideration to be distributed to creditors or money to pay debts which have priority, since all debts, with the exception of the liability under the Guarantee, are to be paid as they become due, including debts incurred prior to the institution of the Chapter XI proceeding and debts incurred during the pendency thereof.

4—No trustee or receiver is to be appointed and Realty is to remain in possession and control of its assets as debtor in possession. Realty is to continue its operations, meeting its obligations as they become due and paying its officers and other expenses as if no Chapter XI proceeding were pending.

Debtor's Petition for Arrangement: Exhibit B.

5—No appraiser or appraisers are to be appointed by the Court to prepare any inventory or appraisal of the property of Realty.

139

6—None of the executory contracts of Realty are to be affected under or by the Arrangement since none are to be rejected thereunder.

7—The Court will retain jurisdiction of Realty in the Chapter XI proceeding at least until (i) the consummation of the Arrangement (which is entirely independent of the institution or consummation of the Plan of Reorganization for Trinity under the Burchill Act); or (ii) confirmation of the Plan under the Burchill Act for Trinity, whichever is sooner.

140

8—Realty may apply to the Court in the Chapter XI proceeding for an injunction and stay until final decree of the commencement or continuation of suits or other proceedings against it with respect to the Guarantee in order that no litigation interfere with the progress of the Arrangement.

9—The institution, confirmation or consummation of the Arrangement shall not (i) constitute a waiver or release of any and all rights and defenses which Realty is presently entitled to under the so-called Mortgage Moratorium and Deficiency Judgment Statutes of the State of New York; or (ii) permit acceleration of the maturity of the principal of the Bond and Mortgage or any other action not in conformity with the Plan by holders of certificates.

141

Debtor's Petition for Arrangement: Exhibit B

B—With respect to the Plan of Reorganization for Trinity

142 1—Neither the Burchill Act proceeding nor any other action or proceeding is to be instituted under the Plan by the Mortgagee or holders of certificates until the Arrangement for Realty has been confirmed in the Chapter XI proceeding.

143 2—The institution, confirmation or consummation of the Arrangement for Realty and the Plan of Reorganization under the Burchill Act for Trinity or of the proceedings for either or both shall not (i) constitute a waiver or release of any and all rights and defenses to which Realty and Trinity or either of them are presently entitled under the so-called Mortgage Moratorium and Deficiency Judgment Statutes of the State of New York; or (ii) permit acceleration of the ~~maturity~~ maturity of the principal of the Bond and Mortgage or any other action not in conformity with the Plan by holders of certificates.

3—No deficiency judgment or judgment on the Bond or Guarantee is to be entered under the Plan either against Realty or Trinity in the Burchill Act proceeding.

144 4—Nothing in the Plan is to affect existing leases of Trinity. All executory contracts of Trinity will be assumed by the New Company under the Plan and none will be rejected or in any manner affected thereunder.

5—The acceptance is also to constitute a direction to Guaranty Trust Company of New York, as Mortgagee, to institute and prosecute the foreclosure under the Burchill Act, to present the Plan to the Court with its

Debtor's Petition for Arrangement: Exhibit B.

petition for foreclosure, and to recite in such petition the number of acceptances received by Trinity, whether or not the same have been filed in the Arrangement proceedings. The acceptance, in addition, will authorize Trinity and Guaranty Trust Company of New York, as Mortgagee, or either of them, if necessary, to obtain certified copies of any acceptances on file in the Arrangement proceedings and to present them to the Court in the Burchill Act proceeding.

145

- 6—It is contemplated that prior to the institution of the Burchill Act proceeding, Trinity will deposit all rents thereafter collected from the mortgaged premises in a special account to be employed for taxes, operation and maintenance of the premises and other expenses upon the order or orders of the Court in such proceeding. At such time as the Plan under the Burchill Act is either consummated or abandoned, the funds in such account will, subject to contrary order of the Court, revert, free and clear, to Trinity or the New Company, as the case may be. In addition, Guaranty Trust Company of New York, as Mortgagee, will be requested to include in its petition for foreclosure a prayer that no receiver of the mortgaged premises or the rents therefrom be appointed.

146

The consummation of the Plan with respect to Realty will be subject to appropriate orders of the Federal Court and with respect to Trinity to appropriate orders of the New York State Court.

147

CONCLUSION

In order to confirm the Arrangement under the aforesaid Chapter XI, and to make the Plan binding on all holders of certificates, written acceptances by the holders of a majority in number and amount of outstanding certificates, whose claims have been proved and allowed, are required. In order to effectuate the Plan under the Burchill Act, it must be

MICRO CARD

TRADE

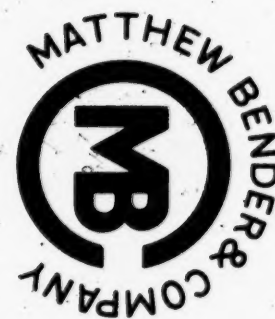
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22

39

651



65



Debtors Petition for Arrangement: Exhibit B.

presented to the Court by the Mortgagee or by persons owning or representing 25% of the outstanding certificates and dissents must not have been filed with the Court by holders of one-third of such certificates within twenty days after the approval of the Plan by the Court. In order to confirm the Arrangement the Federal Court must be satisfied that, among other things, it is for the best interests of the creditors and that it is fair and equitable and feasible. In order to effectuate the Plan under the Burchill Act, hearings with respect thereto must be held before the New York State Court.

Guaranty Trust Company of New York, as Mortgagee, has stated that it does not wish at this time to approve or disapprove or to sponsor either the Plan or any other plan or to commit itself to present the same to any Court and that nothing in the Plan should be so construed.

The officers of both Realty and Trinity will be pleased to furnish any further information or explanations desired regarding the Plan and will be available at their offices, 111 Broadway, New York, N. Y.

BY ORDER OF THE BOARD OF DIRECTORS
OF
UNITED STATES REALTY AND
IMPROVEMENT COMPANY

EDWIN J. BEINECKE
President

BY ORDER OF THE BOARD OF DIRECTORS
OF
TRINITY BUILDINGS CORPORATION
OF NEW YORK

DOUGLAS GRANT SCOTT
President

Dated: May 1, 1939.

Balance Sheet as at December 31, 1938.

(See Opposite)

TRINITY BUILDINGS CORPORATION OF NEW YORK

BALANCE SHEET AS AT DECEMBER 31, 1938.

ASSETS

Cash	\$	10,505.72
Accounts, notes and accrued interest receivable, less reserves of \$38,573.40.....		20,744.61
Inventories of materials and supplies.....		4,419.80
Total Current Assets.....	\$	35,670.13
Sinking fund deposit.....		114.54
Miscellaneous investments, less Reserve of \$15,399.00 (Including securities having a book value of \$2,526.75 deposited as collateral under various agreements).....		2,529.75
Real estate and buildings at cost (See Note 1).....	\$16,396,318.35	
Less—Reserve for depreciation.....	1,646,356.24	14,749,962.11
Office furniture and fixtures.....		5,479.33
Prepaid expenses and deferred charges:		
Prepaid expenses, etc.....	\$ 13,613.67	
Deferred cost of building alterations.....	2,812.00	16,425.67
		<u>\$14,810,181.53</u>

LIABILITIES

Note Payable, 4%, due January 30, 1939 (Endorsed by United States Realty and Improvement Company)	\$	10,000.00
Accounts payable		42,482.28
Accrued interest, taxes and wages.....		23,133.84
Total Current Liabilities (Exclusive of Mortgage maturing June 1, 1939 and indebtedness to United States Realty and Improvement Company).....	\$	75,616.12
Rents received in advance.....		1,728.33
United States Realty and Improvement Company:		
Note due June 1, 1939.....	\$ 8,781,192.44	
Open account	1,661,290.55	10,442,482.99
Reserve for plate glass breakage.....		4,266.61
First Mortgage, Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments)—(See Note 2).....		3,710,500.00
Capital Stock:		
Authorized and issued—1,000 shares without par value—stated value.....		1,000,000.00
Deficit		424,412.52
Contingent Liabilities (See Note 3)		
		<u>\$14,810,181.53</u>

NOTES:

- (1) The amount shown on this balance sheet with respect to real estate and buildings does not purport to be the present or replacement or realizable value. Based upon present conditions in the real estate industry, the book value of real estate and buildings is undoubtedly in excess of the present market value. The accumulated amounts taken for depreciation for income tax purposes are greatly in excess of the amounts provided on the books.
- (2) Sinking fund instalments in the amount of \$372,144.32 were postponed during 1935, 1936, 1937 and 1938 under the provisions of the Mortgage. In addition, sinking fund payments of \$225,000.00 due in 1936, 1937 and 1938 were postponed under the Moratorium Law of the State of New York.

Cash	\$ 10,505.72
Accounts, notes and accrued interest receivable, less reserves of \$38,573.40.....	20,744.61
Inventories of materials and supplies.....	4,419.80
Total Current Assets.....	\$ 35,670.13
Sinking fund deposit.....	114.54
Miscellaneous investments, less Reserve of \$15,399.00 (Including securities having a book value of \$2,526.75 deposited as collateral under various agreements).....	2,529.75
Real estate and buildings at cost (See Note 1).....	\$16,396,318.35
Less—Reserve for depreciation.....	1,646,356.24
	14,749,962.11
Office furniture and fixtures.....	5,479.33
Prepaid expenses and deferred charges:	
Prepaid expenses, etc.....	\$ 13,613.67
Deferred cost of building alterations.....	2,812.00
	16,425.67
	\$14,810,181.53

LIABILITIES

Note Payable, 4%, due January 30, 1939 (Endorsed by United States Realty and Improvement Company)	\$ 10,000.00
Accounts payable	42,482.28
Accrued interest, taxes and wages.....	23,133.84
Total Current Liabilities (Exclusive of Mortgage maturing June 1, 1939 and indebtedness to United States Realty and Improvement Company).....	\$ 75,616.12
Rents received in advance.....	1,728.33
United States Realty and Improvement Company:	
Note due June 1, 1939.....	\$ 8,781,192.44
Open account	1,661,290.55
	10,442,482.99
Reserve for plate glass breakage.....	4,266.61
First Mortgage, Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan dated June 1, 1919 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments)—(See Note 2).....	3,710,500.00
Capital Stock:	
Authorized and issued—1,000 shares without par value—stated value.....	1,000,000.00
Deficit	424,412.52
Contingent Liabilities (See Note 3)	
	\$14,810,181.53

NOTES:

- (1) The amount shown on this balance sheet with respect to real estate and buildings does not purport to be the present or replacement or realizable value. Based upon present conditions in the real estate industry, the book value of real estate and buildings is undoubtedly in excess of the present market value. The accumulated amounts taken for depreciation for income tax purposes are greatly in excess of the amounts provided on the books.
- (2) Sinking fund instalments in the amount of \$372,144.32 were postponed during 1935, 1936, 1937 and 1938 under the provisions of the Mortgage. In addition, sinking fund payments of \$225,000.00 due in 1936, 1937 and 1938 were postponed under the Moratorium Law of the State of New York.
- (3) Contingent Liabilities:
This company filed its Federal income tax return for 1933 in consolidation with United States Realty and Improvement Company and there is a proposed deficiency for that year which is being contested. The Company's Federal income tax returns for the years 1935 to 1938, inclusive, are subject to review by the United States Treasury Department.

TRINITY BUILDINGS CORPORATION OF NEW YORK

INCOME ACCOUNTS

For the Three Years ended December 31, 1938.

Particulars	Year ended December 31,		
	1936	1937	1938
Operating revenues (After deducting provision for doubtful accounts)	\$1,011,822.74	\$1,047,237.60	\$ 913,672.87
Less:			
Operating expenses	344,533.57	363,066.14	346,304.11
Repairs and tenant changes	158,751.90	136,927.99	45,966.15
New York City real estate taxes	324,000.00	328,440.00	328,892.50
Insurance	18,393.81	17,586.98	16,406.36
	<u>\$ 845,679.28</u>	<u>\$ 846,021.11</u>	<u>\$ 737,569.12</u>
Net operating revenues before depreciation	\$ 166,143.46	\$ 201,216.49	\$ 176,103.75
Add:			
Other income	1,455.07	1,790.14	1,356.62
	<u>\$ 167,598.53</u>	<u>\$ 203,006.63</u>	<u>\$ 177,460.37</u>
Deduct:			
Corporate and general expense including Trustees' fees, mortgage bond expense, Federal and State social security taxes, State franchise and Federal capital stock taxes	\$ 15,133.60	\$ 19,712.06	\$ 24,929.75
Interest on mortgage loan	207,220.00	204,077.50	204,077.50
	<u>\$ 222,355.60</u>	<u>\$ 223,789.56</u>	<u>\$ 229,007.25</u>
Net loss before depreciation	\$ 54,757.07	\$ 20,782.93	\$ 51,546.88
Depreciation on office buildings and furniture and fixtures	185,090.53	184,965.98	184,508.17
Net loss	<u>\$ 239,847.60</u>	<u>\$ 205,748.91</u>	<u>\$ 236,055.05</u>

UNITED STATES REALTY AND IMPROVEMENT COMPANY

BALANCE SHEET AS AT DECEMBER 31, 1938.

ASSETS

Current Assets:

Cash	\$ 416,775.82
Accounts, notes, accrued interest and dividend receivable	\$ 33,050.55
Less—Reserve for doubtful accounts	8,743.53
Note receivable—Plaza Operating Company, 4% due April 30, 1939 (Deposited as collateral to Note Payable of \$175,000.00)	175,000.00
Total Current Assets	\$ 616,082.84

Sinking Fund Deposit 60.14

Investments in and Advances to Subsidiaries:

Trinity Buildings Corporation of New York (Including Capital Stock—\$1,000,000)	\$11,442,482.99
Lawyers Building Corporation	1,309,059.46
G. A. F. Realty Corporation	500.00
Whitehall Improvement Corporation (Including mortgage receivable of \$4,000,000.00 pledged to secure Note Payable of \$3,000,000.00)	7,676,445.59
Plaza Operating Company—Non-interest bearing demand note in principal amount of \$3,930,000.00, 25,000 shares of Preferred Stock, par value \$100.00 each and 34,483 shares of Common Stock, par value \$1.00 each—stated at nominal value	1.00
	20,428,489.04

Investment in George A. Fuller Company—

7,786 shares of 4% Cumulative Convertible Preferred Stock, par value \$100.00 each, and 7,893 shares of Common Stock, par value \$1.00 each—(Of which 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock having a book value of \$737,067.00 are deposited as collateral to Note Payable of \$175,000.00)	786,493.00
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Mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds (See Note 1) 682,317.10

Unimproved real estate	\$ 953,213.55
Less—Reserve for depreciation	2,340.03
	950,873.52

Office furniture and fixtures 1,458.18

Prepaid expenses, etc. 13,200.48

\$23,478,974.30

UNITED STATES REALTY AND IMPROVEMENT COMPANY

BALANCE SHEET AS AT DECEMBER 31, 1938.

LIABILITIES

Current Liabilities:

Accounts payable	
Accrued taxes and interest	
Note payable, 4%, due \$37,500.00 on March 30, 1939 (Secured by pledge of 7,334 shares of 4% Preferred Stock and 3,667 shares of Common Stock and \$175,000.00 Note of Plaza Operating Company)	
6% Debenture Note due February 1, 1938 (Not yet paid)	

Total Current Liabilities (Exclusive of sinking fund payments due within one year) 24,307.02

Rent received in advance 60.14

Debentures and note payable (For sinking fund payments due within one year, See Note 2):

Fifteen-Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—See Note 3)

Less—Held in treasury (See Note 3) 786,493.00

6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$182,000.00 principal amount retired) (See Note 3) 682,317.10

Less—Held in treasury 1,458.18

Note Payable, 4%, due August 12, 1939 (Secured by inter-company mortgage of \$4,000,000.00 on Whitehall Improvement Corporation) 950,873.52

Reserves:

For possible losses on investments, etc.—Unapplied balance 13,200.48

Other reserves (Including reserve for depreciation on real estate of subsidiaries—\$153,230.06) 1,458.18

Capital Stock:

Authorized and issued—900,000 shares without par value 13,200.48

Deficit 1,458.18

Contingent liabilities (See Note 4) 13,200.48

Cash		\$ 416,775.82
Accounts, notes, accrued interest and dividend receivable.....	\$ 33,050.55	
Less—Reserve for doubtful accounts.....	8,743.53	24,307.02
Note receivable—Plaza Operating Company, 4% due April 30, 1939 (Deposited as collateral to Note Payable of \$175,000.00).....		175,000.00
Total Current Assets.....		\$ 616,082.84
Sinking Fund Deposit.....		60.14
Investments in and Advances to Subsidiaries:		
Trinity Buildings Corporation of New York (Including Capital Stock—\$1,000,000)	\$11,442,482.99	
Lawyers Building Corporation.....	1,309,059.46	
G. A. F. Realty Corporation.....	500.00	
Whitehall Improvement Corporation (Including mortgage receivable of \$4,000,000.00 pledged to secure Note Payable of \$3,000,000.00)	7,676,445.59	
Plaza Operating Company—Non-interest bearing demand note in principal amount of \$3,930,000.00, 25,000 shares of Preferred Stock, par value \$100.00 each and 34,483 shares of Common Stock, par value \$1.00 each—stated at nominal value.....	1.00	20,428,489.04
Investment in George A. Fuller Company—		
7,786 shares of 4% Cumulative Convertible Preferred Stock, par value \$100.00 each, and 7,893 shares of Common Stock, par value \$1.00 each—(Of which 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock having a book value of \$737,067.00 are deposited as collateral to Note Payable of \$175,000.00).....		786,493.00
Mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds (See Note 1).....		682,317.10
Unimproved real estate.....	\$ 953,213.55	
Less—Reserve for depreciation.....	2,340.03	950,873.52
Office furniture and fixtures.....		1,458.18
Prepaid expenses, etc.....		13,200.48
		<u>\$23,478,974.30</u>

The amounts shown on this balance sheet with respect to investments and real estate do not purport to be present or replacement or realizable values. Based upon present conditions in the real estate industry, some of the book values are undoubtedly in excess of present market values. Some investments are carried at nominal values and undoubtedly some of these investments have values in excess of the amounts at which they are carried, particularly the investment in Plaza Operating Company. See page 14 for Notes 1, 2, 3 and 4 which form an integral part of this balance sheet.

Current Liabilities:

Accounts payable	
Accrued taxes and interest.....	
Note payable, 4%, due \$37,500.00 on March 30, 1939 (Secured by pledge of 7,334 shares of 4% Preferred Stock and 3,667 shares of Common Stock and \$175,000.00 Note of Plaza Operating Company)	
6% Debenture Note due February 1, 1938 (Not)	
Total Current Liabilities (Exclusive of sinking fund payments due within one year).....	

Rent received in advance.....

Debentures and note payable (For sinking fund payments due within one year, See Note 2):

Fifteen-Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1939 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as principal, interest and sinking fund payments—See Note 3).....

Less—Held in treasury (See Note 3).....

6% Sinking Fund Debentures due January 1, 1944 of United States Realty and Improvement Company (less \$182,000.00 principal amount retired (See Note 3).....

Less—Held in treasury.....

Note Payable, 4%, due August 12, 1939 (Secured by inter-company mortgage of \$4,000,000.00 on Whitehall Improvement Corporation).....

Reserves:

For possible losses on investments, etc.—Unapplied for depreciation on real estate—December 31, 1938.....

Other reserves (Including reserve for depreciation on real estate of subsidiaries—\$153,230.06).....

Capital Stock:

Authorized and issued—900,000 shares without par value.....

Deficit

Contingent liabilities (See Note 4).....

Current Liabilities:

Accounts payable	\$ 9,515.33
Accrued taxes and interest.....	95,707.27
Note payable, 4%, due \$37,500.00 on March 30, 1939 and \$137,500.00 on April 30, 1939 (Secured by pledge of 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock of George A. Fuller Company and \$175,000.00 Note of Plaza Operating Company)	175,000.00
6% Debenture Note due February 1, 1938 (Not yet presented for payment).....	1,000.00

Total Current Liabilities (Exclusive of Note Payable of \$3,000,000.00 and sinking fund payments due within one year).....	\$ 281,652.60
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Rent received in advance.....	200.00
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Debentures and note payable (For sinking fund payments due within one year, See Note 2):

Fifteen-Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—See Note 3).....	\$2,237,500.00	
Less—Held in treasury (See Note 3).....	1,026,000.00	\$1,211,500.00

6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$182,000.00 principal amount retired) (See Note 3).....	\$1,219,000.00	
Less—Held in treasury.....	79,500.00	1,139,500.00

Note Payable, 4%, due August 12, 1939 (Secured by pledge of inter-company mortgage of \$4,000,000.00 on Whitehall Building).....	3,000,000.00	5,351,000.00
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Reserves:

For possible losses on investments, etc.—Unapplied balance, December 31, 1938.....	\$ 483,258.14	
Other reserves (Including reserve for depreciation provided in prior years on real estate of subsidiaries—\$153,230.06).....	168,201.70	651,459.84

Capital Stock:

Authorized and issued—900,000 shares without par value—stated value.....	18,000,000.00
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Deficit	805,338.14
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Contingent liabilities (See Note 4)

\$23,478,974.30

NOTES TO THE BALANCE SHEET

As at December 31, 1938

- (1) Voting trust certificates representing 8,576 shares of Fuller Building Corporation carried on the books of United States Realty and Improvement Company at the nominal value of \$1.00 are pledged as security for the fund and principal at maturity of G. A. F. Realty Corporation 6% Gold Debentures and as security for the 6% Gold Debentures of 1944, of United States Realty and Improvement Company. Upon the tender of such stock to Fuller Building Corporation, the certificates will be returned by that corporation.
- (2) Sinking fund payments due within one year—
G. A. F. Realty Corporation, Fifteen-Year Sinking Fund Debentures (which may be paid in cash or in debentures of United States Realty and Improvement Company) maturing in 1944—\$14,375. The debentures which may be used for sinking fund payments are United States Realty and Improvement Company 6% Debentures theretofore issued (which have a redemption price of 102). The Company has no other sinking fund debentures which may be used for sinking fund payments.
- (3) The 6% Sinking Fund Debentures of United States Realty and Improvement Company are being issued pursuant to a Trust Agreement with the Fuller Building Corporation in exchange for 6% Debentures of the G. A. F. Realty Corporation. The 6% Debentures so acquired, are shown as held in treasury.
- (4) Contingent Liabilities—
 - (a) Guarantee of the principal, interest and sinking fund payments of Twenty-Year Five and One-half Per Cent Sinking Fund Debentures of Trinity Buildings Corporation of New York, maturing 1, 1919, of Trinity Buildings Corporation of New York. These certificates were outstanding at December 31, 1938, aggregating \$372,144.32 were postponed in 1935, 1936 and 1937. Mortgage. In addition, sinking fund payments for 1937 and 1938 were postponed under the Moratorium Act.
 - (b) Endorsement of the note payable for \$10,000, to the Fuller Building Corporation of New York, which note has since been paid.
 - (c) Proposed deficiency in Federal income taxes for 1937 and 1938, approximately \$45,000.00. The company's Federal income taxes, inclusive, are subject to review by the United States Treasury Department.
 - (d) A proposed assessment of intangible personal property of the Fuller Building Corporation, N. J., for the years 1937 and 1938 in an independent valuation.
 - (e) The Company reports no further contingent liabilities, litigation, claims for personal injuries, etc., which will not result in losses of any consequence.

ANCE SHEET

31, 1938.

res of Class "B" Common Stock of Fuller
ted States Realty and Improvement Company
curity for its guarantees of interest, sinking
alty Corporation Fifteen-Year Sinking Fund
% Sinking Fund Debentures, due January 1,
Company, subject to an agreement to sur-
in the eventuality of a lack of certain earn-

sinking Fund 6% Gold Debentures—\$153,000.00
es at the redemption price of 102). United
holds \$1,026,000.00 principal amount of these
fund purposes.

pany, 6% Sinking Fund Debentures due Janu-
ber 15, 1939 for each \$500.00 principal amount
y be paid in cash or in debentures at the re-
olds \$79,500.00 principal amount of these de-
d purposes. (See Note 3.)

tes Realty and Improvement Company were
and the Reorganization Plan of G. A. F. Realty
latter company on a par for par basis. G. A. F.
less amounts used for sinking fund purposes,

ng fund payments on the First Mortgage
Sinking Fund Gold Loan Certificates, dated June
New York. \$3,710,500.00 principal amount of
er 31, 1938. Sinking fund instalments aggre-
6, 1937 and 1938 under the provisions of the
s aggregating \$225,000.00 due in 1936, 1937
n Law of the State of New York.

due January 30, 1939 of Trinity Buildings
e been paid.

or 1933 which is being contested—approx-
income tax returns for the years 1935 to 1938
States Treasury Department.

property taxes by the City of Jersey City,
terminate amount.

ilities except in respect of pending routine
hich, in the opinion of the Company's counsel,

INCOME ACCOUNT
For the Three Years ended

Particulars

Operating Revenues:

Rental income from a subsidiary dissolved during
Rental income from other tenants (after deducting
provisions for doubtful accounts)
Total operating revenues

Deduct:

Operating expenses
Real estate taxes

Net operating loss before depreciation

Other Income:

Interest from Subsidiaries—
Whitehall Improvement Corporation
Plaza Operating Company
Other interest
Dividends
Discounts, etc.

Deduct:

General and corporate expenses
Rent paid to a subsidiary
State franchise and Federal capital-stock taxes
Federal and State social security taxes

Net income before interest charges and depreciation

Interest Charges:

6% Debenture Notes
Fifteen-Year Sinking Fund 6% Gold Debentures
G. A. F. Realty Corporation
6% Sinking Fund Debentures of United States Realty
and Improvement Company
Notes payable

Net loss before depreciation

Depreciation, as provided by the Company:

Buildings
Office furniture and fixtures

Net loss

ACCOUNTS

ed December 31, 1938.

Year ended December 31,

	1936	1937	1938
1937	\$ 7,007.40	\$ 373.66	\$
ting	11,501.98	13,154.91	9,280.97
	<u>\$ 18,509.38</u>	<u>\$ 13,528.57</u>	<u>\$ 9,280.97</u>
	\$ 2,451.77	\$ 2,347.91	\$ 1,919.47
	44,798.26	24,616.89	11,785.92
	<u>\$ 47,250.03</u>	<u>\$ 26,964.80</u>	<u>\$ 13,705.39</u>
	<u>\$ 28,740.65</u>	<u>\$ 13,436.23</u>	<u>\$ 4,424.42</u>
	\$313,518.96	\$313,518.96	\$313,518.96
	18,141.64	18,114.93	10,859.73
	4,150.75	9,586.34	18,266.25
			33,644.00
	571.79	1,026.28	1,185.23
	<u>\$336,383.14</u>	<u>\$342,246.51</u>	<u>\$377,474.17</u>
	<u>\$307,642.49</u>	<u>\$328,810.28</u>	<u>\$373,049.75</u>
	\$134,576.06	\$100,312.96	\$ 81,656.48
	13,278.00	13,047.00	10,787.00
	21,392.97	23,263.58	16,676.05
	699.24	1,989.63	2,145.41
	<u>\$169,946.27</u>	<u>\$138,613.17</u>	<u>\$111,264.94</u>
de-	<u>\$137,696.22</u>	<u>\$190,197.11</u>	<u>\$261,784.81</u>
	\$ 22,245.67	\$ 21,695.37	\$ 1,646.67
s of	108,005.00	79,075.33	73,564.50
alty	46,065.83	69,726.59	68,467.34
	152,266.64	141,470.95	142,632.62
	<u>\$328,583.14</u>	<u>\$311,968.24</u>	<u>\$286,311.13</u>
	<u>\$190,886.92</u>	<u>\$121,771.13</u>	<u>\$ 24,526.32</u>
	\$ 14,358.62	\$ 9,475.60	\$ 325.00
	455.01	364.01	364.54
	<u>\$ 14,813.63</u>	<u>\$ 9,839.61</u>	<u>\$ 689.54</u>
	<u>\$205,700.55</u>	<u>\$131,610.74</u>	<u>\$ 25,215.86</u>

Debtor's Petition for Arrangement: Exhibit B.

EXHIBIT A.

178 GUARANTEE, dated as of December 1, 1938, by UNITED STATES REALTY AND IMPROVEMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as "Realty"), to GUARANTY TRUST COMPANY OF NEW YORK (a corporation organized and existing under the Banking Law of the State of New York, hereinafter referred to as the "Mortgagee"), as Mortgagee under the First Mortgage Five and One-Half Per Cent Sinking Fund Gold Loan, dated June 1, 1919, of Trinity Buildings Corporation of New York.

179 WHEREAS, an Arrangement (known as the "Amended Modification Plan and Arrangement of Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Sinking Fund Gold Loan, due June 1, 1939, and Guarantee thereof", dated May 1, 1939) for Realty under Chapter XI of the Bankruptcy Act has been confirmed by an Order of the United States District Court for the Southern District of New York, dated , 1939, in proceedings entitled "In the Matter of United States Realty and Improvement Company, Debtor, No. "; and

180 WHEREAS, such Arrangement concerned the modification and extension of a Guarantee by Realty of the aforesaid First Mortgage Loan of Trinity Buildings Corporation of New York; and

WHEREAS, such Arrangement provided:

"In the event the Arrangement under Chapter XI is confirmed, Realty shall unconditionally guarantee the due and punctual payment by Trinity, or the New Com-

Debtor's Petition for Arrangement: Exhibit B.

pany, as the case may be, of *principal* and *interest* on the Bond and Mortgage as modified hereunder or on the New Bonds, as the case may be. The obligation of Realty as modified by the Arrangement shall be a Guarantee of principal with a maturity of July 1, 1949 and of fixed and additional interest as herein described. *The Guarantee of Realty shall be unconditionally and irrevocably modified in the event the Arrangement under Chapter XI of the Bankruptcy Act is confirmed*, regardless whether or not (a) the Burchill Act proceeding is instituted, (b) the Plan of Reorganization thereunder is approved by the Court, or (c) such Plan is consummated."

and

WHEREAS, the aforesaid Court has approved the form of this Guarantee and has directed its execution by an Order dated , 1939;

NOW, THEREFORE, in consideration of the premises, Realty for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, as Mortgagee aforesaid; its successors and assigns, and to the holders and registered owners from time to time of certificates for shares in the aforesaid First Mortgage Loan, the due and punctual payment by ~~Trinity~~ Buildings Corporation of New York of (a) the principal of such Loan with a maturity of July 1, 1949 as and when the same shall become due and payable whether at such maturity or by declaration under the terms of the obligation as modified under the aforesaid Amended Modification Plan and Arrangement; (b) interest on such First Mortgage Loan at the rate of 3% per annum commencing December 1, 1938 and payable on July 1, 1939 and

Debtor's Petition for Arrangement: Exhibit B.

184 semi-annually thereafter; (c) additional interest in an amount equivalent to the sum of 1% per annum for the period December 1, 1938 until July 1, 1944 and of 2% per annum for the period July 1, 1944 until July 1, 1949 of outstanding certificates for shares and payable on July 1, 1949 to the extent not theretofore paid.

No delay or omission by the Mortgagee, its successors and assigns, or of the holders or registered owners for the time being of said certificates for shares to exercise any right, power or privilege consequent upon any default and no waiver of any default or its consequences shall in any wise affect or discharge the unconditional liability or responsibility of Realty upon its Guarantee as hereinabove set forth.

185 Any or all the terms of this Guarantee, including without limitation extension of the maturity or reduction of interest rate, may, from time to time, be modified upon the written consent delivered to the Mortgagee of holders of not less than 66⅔% in principal amount of certificates for shares then outstanding and upon the written consent of Realty; provided, however, that written dissents to such modification or modifications shall not have been received from holders of 20% or more in principal amount of the certificates for shares then outstanding. Outstanding certificates for shares held by Realty or Trinity Buildings Corporation of New York or any subsidiary of either shall not be so voted and shall not be included in the determination of outstanding certificates for shares. In the event the aforesaid Amended Modification Plan and Arrangement is consummated as a Plan of Reorganization for Trinity Buildings Corporation of New York under the New York State Burchill Act, this provision shall be binding upon the Trustee under the New Indenture and

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Debtor's Petition for Arrangement: Exhibit B.

upon the holders of New Bonds described in the aforesaid Amended Modification Plan and Arrangement.

Realty does hereby expressly covenant that in the event the aforesaid Amended Modification Plan and Arrangement is consummated as a Plan of Reorganization for Trinity Buildings Corporation of New York under the New York State Burchill Act this Guarantee shall run to the Trustee under the New Indenture and to holders of New Bonds described in the aforesaid Amended Modification Plan and Arrangement.

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IN WITNESS WHEREOF, United States Realty and Improvement Company has caused these presents to be executed by its proper officers thereunto duly authorized and its corporate seal to be hereunto affixed and duly attested as of the day and year aforesaid.

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UNITED STATES REALTY AND IMPROVEMENT COMPANY

By

President

ATTEST:

Secretary

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

On the day of , 1939, before me came EDWIN J. BEINECKE, to me known, who, being by me duly sworn, did depose and say that he resides at 812 Park Avenue, New York, N. Y.; that he is President of UNITED STATES REALTY AND IMPROVEMENT COMPANY, the corporation described in and which executed the foregoing instrument: that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

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Debtor's Petition for Arrangement.

Exhibit C.


(See Opposite)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER
OF
UNITED STATES REALTY
AND IMPROVEMENT COMPANY,
Debtor.

In proceedings under
Chapter XI of the
Bankruptcy Act

STATE OF
COUNTY OF } ss.:  Fill in name of State and County

The undersigned, being duly sworn, deposes and says, that he is

Cross out
paragraphs
not applicable

(1) a holder (for individuals)
(2) a member of the firm of which is a holder (for partnerships) (Print name of partnership)
(3) (Print officer's title) of (Print name of corporation) a corporation carrying on business in the county and state first above (Print state of incorporation) mentioned, which is a holder (for corporations)

of the below described Share Certificates in the First Mortgage Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan, due June 1, 1939, of Trinity Buildings Corporation of New York, and that he is duly authorized to make this proof of claim and give this acceptance.

This claim is founded upon a guarantee executed and delivered by the Debtor as of June 1, 1919 (a true copy of which is printed on the reverse hereof) to Guaranty Trust Company of New York, as Mortgagee, and Claimant is the owner of the following Share Certificates with coupons dated June 1, 1939 attached:

SHARE CERTIFICATES HELD BY THE UNDERSIGNED
(List each certificate separately)

Certificate Numbers

Principal Amount

FILL IN


.....	\$
.....
.....

Total \$

The consideration for the debt (namely, the guarantee) is the purchase of the aforesaid certificates from the Debtor. The Debtor is justly and truly indebted to Claimant as of the date of the filing of its petition in the aforesaid amount with interest thereon from December 1, 1938 and there are no set-offs or counter-claims thereto and no judgment has been rendered thereon nor have any payments been made by the Debtor thereon.

Claimant holds no security for said debt (namely, the guarantee) but as security for the primary obligation represented by said Share Certificates, Claimant is entitled to a share in a Bond and Mortgage of Trinity Buildings Corporation of New York held by Guaranty Trust Company of New York, as Mortgagee.

Claimant hereby severally accepts the Amended Modification Plan and Arrangement, dated May 1, 1939 (the receipt of a copy of which is hereby acknowledged) as (a) an Arrangement pursuant to Chapter XI of the Bankruptcy Act with respect to the obligation of the Debtor on its aforesaid guarantee, and separately and independently as (b) a Plan of Reorganization under the New York State Burchill Act with respect to the obligation of Trinity Buildings Corporation of New York on the aforesaid Loan and the Share Certificates therein.

This acceptance in so far as it concerns the modification of the obligation of the Debtor under its guarantee is not a confirmation or consummation of the plan or any proceeding with respect to the obligation of

obtained as to the Arrangement is revocable in writing at any time prior to the confirmation thereof by the organization under the Burchill Act is revocable in writing at any time prior to the determination thereof by

SHARE CERTIFICATES HELD BY THE UNDERSIGNED

(List each certificate separately)

Certificate Numbers

Principal Amount

FILL IN

Total \$.....

The consideration for the debt (namely, the guarantee) is the purchase of the aforesaid certificates from the Debtor. The Debtor is justly and truly indebted to Claimant as of the date of the filing of its petition in the aforesaid amount with interest thereon from December 1, 1938 and there are no set-offs or counter-claims thereto and no judgment has been rendered thereon nor have any payments been made by the Debtor thereon.

Claimant holds no security for said debt (namely, the guarantee) but as security for the primary obligation represented by said Share Certificates, Claimant is entitled to a share in a Bond and Mortgage of Trinity Buildings Corporation of New York held by Guaranty Trust Company of New York, as Mortgagee.

Claimant hereby severally accepts the Amended Modification Plan and Arrangement, dated May 1, 1939 (the receipt of a copy of which is hereby acknowledged) as (a) an Arrangement pursuant to Chapter XI of the Bankruptcy Act with respect to the obligation of the Debtor on its aforesaid guarantee, and separately and independently as (b) a Plan of Reorganization under the New York State Burchill Act with respect to the obligation of Trinity Buildings Corporation of New York on the aforesaid Loan and the Share Certificates therein.

This acceptance, in so far as it concerns the modification of the obligation of the Debtor under its guarantee is not conditioned on the institution, confirmation or consummation of the plan or any proceeding with respect to the obligation of Trinity Buildings Corporation of New York.

Claimant hereby authorizes and directs Trinity Buildings Corporation of New York to which this acceptance and proof of claim is delivered to file the same at or before the first meeting of creditors in the proceedings under Chapter XI of the Bankruptcy Act.

Claimant hereby authorizes and directs Guaranty Trust Company of New York, as Mortgagee, to institute and prosecute (after and not before the confirmation of the Arrangement) a foreclosure proceeding under the Burchill Act, to present the Modification Plan and Arrangement to the New York State Court with its petition for foreclosure under such Act, and to recite in such petition the number and amount of acceptances received by Trinity. Furthermore, Guaranty Trust Company of New York, as Mortgagee, and Trinity Buildings Corporation of New York are severally authorized and directed, if necessary, to present to the Court in the Burchill Act proceeding a certified copy of this acceptance, if on file as a proof of claim in the Arrangement proceedings, or to present to such Court this acceptance if not so on file and to take any and all action deemed necessary or advisable in connection with the confirmation, effectuation and consummation of the Modification Plan and Arrangement.

Guaranty Trust Company of New York, as Mortgagee, is also authorized and directed in its petition for foreclosure under the Burchill Act to request the Court that no receiver of the mortgaged premises or the rents therefrom be appointed.

Guaranty Trust Company of New York, as Mortgagee, is also authorized and directed to bid at the foreclosure sale of the mortgaged premises under the Burchill Act the maximum amount set forth in the Modification Plan and Arrangement or such other maximum amount as may be fixed by the Court for the purchase of such premises.

Subscribed and sworn to before me

(Name of certificate holder)

this day of, 1939.

(Name of partner or officer of corporation, if any)

(Notary public or other officer authorized to take verifications)

(Address)

[Notarial Seal]

(Please print here name of above signature)

Be certain that name of state and county are filled in at the top of this Acceptance.

The following is a true copy of the Guarantee held by Guaranty Trust Company of New York as Mortgagee for the benefit of the holders of the outstanding certificates:

UNITED STATES REALTY AND IMPROVEMENT COMPANY GUARANTEE

Know All Men by these Presents, That

WHEREAS, Trinity Buildings Corporation of New York has executed and delivered to Guaranty Trust Company of New York, its certain bond for its First Mortgage Twenty-Year Five and One-Half Per Cent. Gold Loan in the principal sum of seven million dollars (\$7,000,000), dated June 1, 1919, and payable on the first day of June, 1939, with interest at the rate of five and one-half per cent. per annum, and has executed and delivered to said Trust Company, to secure the payment of said bond, a mortgage upon the premises and buildings known as the Trinity Building and the United States Realty Building in the City of New York; and

WHEREAS, the said Trust Company as the holder of said bond and mortgage has issued a series of certificates representing pro rata shares in said bond and mortgage in the aggregate principal sum of seven million dollars (\$7,000,000); and

WHEREAS, the undersigned United States Realty and Improvement Company, a corporation of the State of New Jersey, hereinafter termed the "Realty Company", has purchased the entire issue of said certificates, and intends to re-sell the same, and, as a condition of such resale, and in order to induce the purchasers to accept and pay for said certificates, has agreed to guarantee unconditionally the said bond and mortgage and said Trinity Buildings Corporation of New York.

NOW, THEREFORE, in consideration of the premises, and FOR VALUE RECEIVED, United States Realty and Improvement Company, for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, its successors and assigns, and to the holders and registered owners from time to time of the said certificates for shares in said bond and mortgage, the due and punctual payment by Trinity Buildings Corporation of New York of the principal and interest of its said bond and mortgage, dated June 1, 1919, as and when the same shall become due and payable whether at maturity or by declaration or otherwise, and of the sinking fund payments and other sums and charges therein required to be paid by it, and as well the due performance and observance by said Trinity Buildings Corporation of New York of all the terms, conditions and covenants in said bond and mortgage contained on its part to be performed and observed; all demands and notice or notices of default or defaults being hereby waived.

AND IT IS HEREBY FURTHER COVENANTED, STIPULATED AND AGREED, that in the event of default by said Trinity Buildings Corporation of New York under the terms of said bond and mortgage, and as often as any such default shall occur, no delay or omission by said Guaranty Trust Company of New York, its successors and assigns, or of the holders and registered owners for the time being of said certificates, to exercise any right, power or privilege consequent upon any such default, and no waiver of any such default or its consequences shall in any wise affect or discharge the unconditional liability and responsibility of the undersigned Realty Company upon this guarantee.

IN WITNESS WHEREOF, the undersigned Realty Company has caused these presents to be executed by its proper officers thereunto duly authorized, and its corporate seal to be hereunto affixed and duly attested, as of the first day of June, 1919.

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

By PAUL STARRETT,
President

*Debtor's Petition for Arrangement.***Exhibits D and E.****SCHEDULES REQUIRED BY SECTION 324
OF THE BANKRUPTCY ACT**

196 **Note:** The following schedules set forth the liabilities and assets of the Debtor on the accrual basis inasmuch as the proceedings herein are for an Arrangement under Chapter XI and inasmuch as it is impracticable to set them forth on a cash basis. The proceedings instituted herein are for an Arrangement respecting the modification and extension of only one obligation of the Debtor and therefore, on information and belief, the schedules attached are sufficient compliance with the Bankruptcy Act.

197 In all instances in the Schedules relating to assets of the Debtor the values given are the book values which do not purport to represent present market or realizable values.

Inasmuch as the books of the Debtor are maintained on a month to month basis, all of the figures contained in the following schedules of liabilities and assets are set forth as of April 30, 1939.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,
PETITIONER

198 By FREDERICK M. SANDERS
Executive Vice-President

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (1)****STATEMENT OF ALL DEBTS OF DEBTOR**

Statement of all creditors who are to be paid in full or to whom priority is secured by law.

**CLAIMS
WHICH HAVE
PRIORITY**

AMOUNT
Dollars Cents

1.	Taxes and debts due and owing the United States	Tax withheld on Coupons paid to Non-resident aliens	39	75	
		Tax withheld at source	1080	90	
		Federal Unemployment Taxes	68	61	
		Federal Old-Age Pension Tax	48	21	200
		Federal Capital Stock Tax (Approx. \$960. due July 1939)	800	00	Acr'd
2.	Taxes due and owing to the State of New York	New York State Unemployment Tax	73	66	
		City of New York Sales Tax		09	
		New Jersey State Franchise Tax (\$3075. due August 1939)			
	Taxes due and owing to the State of New Jersey	Accrued	1025	00	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (1) (CONT'D)**

3.
 202 Wages due
 workmen,
 Clerks or
 Servants, to
 an amount not
 exceeding \$600
 each, earned
 within
 three months
 before filing
 the petition

None

4.
 203 Other debts
 having
 priority
 by law

None

Total \$3,136.22

**UNITED STATES REALTY AND
 IMPROVEMENT COMPANY, PETITIONER**

By **FREDERICK M. SANDERS**
 Executive Vice-President

SCHEDULE A. (2)

204 **CREDITORS HOLDING SECURITIES**

(N.B.—Particulars of Securities held, with dates of same, and when they were given to be stated under the names of the several Creditors, and also particulars concerning each Debt, as required by the Acts of Congress relating to Bankruptcy, whether contracted as partner or joint-contractor with any other person; and if so, with whom.)

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (2) (CONT'D)**

	VALUE OF SECURITIES		AMOUNT OF DEBTS		
	Dollars	Cents	Dollars	Cents	
Manufacturers Trust Company 55 Broad Street, New York, N. Y.					205
Note Payable, 4%, due \$37,500.00 November 30, 1939 and quarterly thereafter until August 30, 1940 when balance becomes due. (Secured by pledge of 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock of George A. Fuller Company and \$137,500.00 Note of Plaza Operating Company, having a book value in the aggregate of \$874,567.00—These securities are also pledged to secure payment by Plaza Operating Company to Manufacturers Trust Company of any amounts borrowed from time to time. At April 30, 1939 Plaza Operating Company owed Manufacturers Trust Company \$100,000.00 on note due \$25,000.00 on May 30, 1939 and \$25,000.00 monthly thereafter.)			\$137,500.00		206
Interest thereon to April 30, 1939			45.84		
National City Bank of New York, 55 Wall Street, New York, N. Y.					207
Note Payable, 4%, due August 12, 1939. (Secured by pledge of \$4,000,000. Bond and Mortgage covering Whitehall Building and the premises 20-26 Washington Street and 15-17 West Street, New York, N. Y.)			3,000,000.00		
Interest thereon to April 30, 1939			1,333.34		

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (2) (CONT'D)**

		VALUE OF SECURITIES	AMOUNT OF DEBTS
		Dollars Cents	Dollars Cents
208	Various holders of G. A. F. Realty Corporation 6% Debentures due January 1, 1944 (Guaranteed by United States Realty and Improvement Company). Bearer—names of owners not known.		\$1,204,500.00
	Interest thereon to April 30, 1939		24,090.00
209	The G. A. F. Realty Corp. was reorganized under Section 77-B of the Bankruptcy Act. The plan of reorganization was consummated on Jan. 31, 1936. Under the plan the G. A. F. Realty Corp. was discharged from liability as to these debentures and the holders thereof were relegated to the guarantees of the United States Realty and Improvement Co. in respect thereto. Under the plan the holders of such debentures were given the opportunity of exchanging same, par for par, for the debentures of the United States Realty and Improvement Co., similar in terms to the existing guarantees of the United States Realty and Improvement Co. of the payment of sinking fund, interest and principal at maturity of said debentures of the G. A. F. Realty Corp.		
210	Various holders of United States Realty and Improvement Company 6% Debentures due Jan. 1, 1944. Bearer—names of owners not known. (Issued in exchange for G. A. F. Realty Corp. 6% Debentures due Jan. 1, 1944—Guaranteed by United States Realty and Improvement Co.)		1,139,500.00

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (2) (CONT'D)**

VALUE OF SECURITIES		AMOUNT OF DEBTS	
Dollars	Cents	Dollars	Cents

Interest thereon to April 30, 1939

22,790.00

Voting Trust certificates representing 8,576 shares of Class "B" Common Stock of Fuller Building Corporation carried on the books of United States Realty and Improvement Company at the nominal value of \$1.00 are pledged as security for its guarantees of interest, sinking fund and principal at maturity of G. A. F. Realty Corporation Fifteen-Year Sinking Fund 6% Gold Debentures and for the payment of interest, sinking fund and principal at maturity of the 6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company, subject to an agreement to surrender such stock to Fuller Building Corporation in the eventuality of a lack of certain earnings by that corporation.

TOTAL**\$5,529,759.18**

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONERBy **FREDERICK M. SANDERS****Executive Vice-President**

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (3)****CREDITORS WHOSE CLAIMS ARE UNSECURED**

	AMOUNT	
	Dollars	Cents
F. S. Webster Company, 1-23 Amherst St., Kendall Sq., Mass.	\$	40.80
Union Card & Paper Company, 45 Beekman Street, New York, N. Y.		4.72
Bainbridge, Kimpton & Haupt, Inc., 218 Greenwich St., New York, N. Y.		5.08
15 Colonial Typewriter Co., 92 Liberty St., New York, N. Y.		3.00
John C. Paige & Company, Inc., 111 Broadway, New York, N. Y.		16.76
Underwood Elliott Fisher Co., 1 Park Avenue, New York, N. Y.		1.50
Arthur Anderson & Company, 67 Wall Street, New York, N. Y.		3,500.00
16 Various unknown holders of stock scrip certificates		163.50
The New York Trust Company, 100 Broadway, New York, N. Y.		2,354.29
Total		\$6,089.65

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By FREDERICK M. SANDERS

Debtor's Petition for Arrangement: Exhibits D and E.

✓ SCHEDULE A. (4)

**LIABILITIES ON NOTES OR BILLS DISCOUNTED, WHICH
OUGHT TO BE PAID BY THE DRAWERS, MAKERS, AC-
CEPTORS OR ENDORSERS**

217

(N.B.—The dates of the Notes or Bills, and when due, with the Names, Residences, and the Business or Occupation of the Drawers, Makers or Acceptors thereof are to be set forth under the Names of the holders. If the Names of the Holders are not known, the Name of the last Holder known to the Debtor shall be stated and his business and place of residence. The same particulars as to Notes or Bills on which the Debtor is liable as Endorser.)

AMOUNT

218

Dollars Cents

NONE

TOTAL

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

SCHEDULE A. (5)

ACCOMMODATION PAPER

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(N. B.—The dates of the Notes or Bills, and when due, with the Names and Residences, of the Drawers, Makers and acceptors thereof, are to be set forth under the Names of the holders; if the bankrupt be liable as Drawer, Maker, Acceptor or Endorser thereof; it is to be stated accordingly. If the names of the Holders are not known, the Name of the last

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (5) (Cont'd.)**

Holder known to the Debtor should be stated, with his residence. The same particulars as to other commercial paper.)

AMOUNT

Dollars Cents

None

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

SCHEDULE A. (6)

**CREDITORS WHO ASSERT CONTINGENT, UNLIQUIDATED,
OR DISPUTED CLAIMS.**

AMOUNT

Dollars Cents

Contingent liability on Guarantee executed and delivered to Manufacturers Trust Company, 55 Broad Street, New York, N. Y., dated April 28, 1939, of a note of Plaza Operating Company in the amount of \$100,000.00 and bearing interest at the rate of 4% per annum. This note is payable \$25,000.00 on May 30, 1939, and \$25,000.00 on the 30th of each month thereafter. Petitioner is contingently liable with respect to this obligation. This guarantee and a note of Petitioner to Manufacturers Trust Company are secured by the pledge of certain securities as hereinabove set forth.

Principal Amount

\$100,000.00

Interest thereon to April 30, 1939

33.33

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (6) (CONT'D)**

	AMOUNT		
	Dollars	Cents	
Contingent liability on Guarantee dated June 1, 1919, executed and delivered to Guaranty Trust Company of New York, as Mortgagee, 140 Broadway, New York, N. Y., and guaranteeing the First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan due June 1, 1939, of Trinity Buildings Corporation of New York. The Petitioner is contingently liable with respect to such obligation and it is the obligation under this guarantee alone which is the subject of the Arrangement submitted herewith.			2
Principal Amount	3,710,500.00		2
Accrued interest to April 30, 1939	85,032.29		
Contingent liability on Endorsement of note of Trinity Buildings Corporation of New York, dated April 28, 1939, and due May 15, 1939, in the principal amount of \$15,000.00 discounted at 4% by Manufacturers Trust Company, 55 Broad Street, New York, N. Y., upon which note Petitioner is contingently liable.			
Principal Amount.	15,000.00		22

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE A. (6) (CONT'D)**

	AMOUNT	
	Dollars	Cents
Proposed deficiency in Federal income taxes for 1933 which is being contested.		

Possible liability for intangible personal property taxes to City of Jersey City for the years 1937, 1938 and 1939 in an indeterminate amount.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,
PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

[Verification to Schedule A]

SCHEDULE B. (1)**STATEMENT OF ALL PROPERTY OF BANKRUPT REAL ESTATE**

	BOOK VALUE	
	Dollars	Cents
ALL that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:		

BEGINNING at a point on the northerly side of Thames Street, distant 34 feet 10½ inches westerly from the west-

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

BOOK VALUE		
Dollars	Cents	
		22

erly side of Trinity Place, at the easterly face of the easterly wall of the building on the premises herein described and adjoining the land of St. Peter's School, and running thence **NORTHERLY**, along the easterly face of said wall and the land of St. Peter's School, 32 feet 4 inches to other lands of St. Peter's School; thence **WESTERLY**, along the same, to and along the southerly face of the building adjoining on the northerly side, 33 feet 2 inches to other lands of St. Peter's School at a point opposite the westerly face of the westerly wall of the building on the premises herein described; thence **SOUTHERLY** to and along the same, 32 feet 4 inches to the northerly side of Thames Street and thence **EAST-ERLY**, along the same 33 feet 2 inches to the point or place of beginning.

23

SAID PREMISES being now or lately known as and by the Street Numbers 15 and 15½ Thames Street.

\$62,551.65.

ALL that certain lot, piece or parcel of land, with the buildings thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

23

BEGINNING at the corner formed by the intersection of the northerly side of East 49th Street and the westerly side of First Avenue; running thence **Westerly**, along the northerly side of East 49th Street, 225 feet; running thence **Northerly**, parallel with First Avenue, 100 feet 5 inches to the center line of the block between 49th and 50th

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**BOOK VALUE
Dollars Cents

232

Streets; running thence Easterly, along said center line of the block, 225 feet to the westerly side of First Avenue; running thence Southerly, along the westerly side of First Avenue, 100 feet 5 inches to the point or place of beginning.

TOGETHER WITH any and all strips or gores of land adjoining said property owned by the Newplan Holding Corporation.

233

Said premises now being known as and by the Street numbers 341 to 359 East 49th t and 883 to 891 First Avenue.

TOGETHER WITH any and all buildings, structures, improvements and fixtures and articles of personal property used in the operation of said premises.

\$613,362.

234

ALL that plot of land in the Village of White Plains, County of Westchester and State of New York, known and designated as lots Numbers Twenty-One, Twenty-Two, Forty-Six and Forty-Seven on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester County, property of Joshua M. Sprague, June, 1902", made by Byrne & Darling, Civil Engineers and Surveyors, White Plains, New York, filed in the office of the Register of the County of Westchester on June 16, 1902, in Volume 14 of Maps, page 73, being more particularly bounded and described as follows:— BEGINNING at a point of intersection of the northerly side of Livingston Avenue and the easterly side of Mamaroneck Avenue; thence northerly

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**BOOK VA
Dollars C

along the easterly side of Mamaroneck Avenue on a curve to the right with a radius of four hundred and eleven and seventy-two one-hundredths feet a distance of twenty-five and thirty-five one-hundredths feet to a point; thence north nine degrees, twenty-five minutes, thirty seconds west still along the easterly side of Mamaroneck Avenue a distance of seventy-four and sixty-six one-hundredths feet to the division line between lot Number Twenty and lot Number Twenty-One on the aforesaid map; thence north

eighty degrees, thirty-four minutes thirty seconds east along said last division line and the division line between lot Number Forty-Five and lot Number Forty-Six a distance of two hundred and sixty feet to the westerly side of Waller Avenue; thence south nine degrees, twenty-five minutes, thirty seconds east along the westerly side of Waller Avenue a distance of one hundred feet to the northerly side of Livingston Avenue; thence south eighty degrees, thirty-four minutes, thirty seconds west along the northerly side of Livingston Avenue a distance of two hundred and fifty-nine and twenty-two one-hundredths feet to the point or place of beginning.

\$125,46

ALL that certain plot, piece or parcel of land in the City of White Plains, County of Westchester and State

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

BOOK VALUE	
Dollars	Cents

238

of New York, designated as Lots Numbers 15 and 16 on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester County, New York, property of Joshua M. Sprague" made by Byrne & Darling, Civil Engineers and Surveyors, White Plains, New York, dated June, 1902 and filed in the office of the Register of Westchester County, June 16, 1902 in Volume 14, page 73 of maps.

239

Together with all the right, title and interest of the parties of the first part, of, in and to the highway in front of and adjacent to said premises to the center line thereof.

Being the same premises conveyed to the parties of the first part by deed of Frederick R. Reed and Helen W. Reed, his wife, recorded in Liber 2930 of Deeds, Page 401, in the Westchester County Register's office.

Said premises herein conveyed being further bounded and described as follows:

All those two lots of land in the City of White Plains, County of Westchester and State of New York, designated as Lots Nos. 15 and 16 on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester County, New York, property of Joshua M. Sprague" made by Byrne and Darling, Civil Engineers and Surveyors, White

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

BOOK VALUE
 Dollars Cents

Plains, New York, dated June 1902 and filed in the office of the Register of Westchester County June 16, 1902, being bounded and described with reference to said map as follows:

BEGINNING at a point on the easterly side of Mamaroneck Avenue where the same is intersected by the dividing line between lots 14 and 15; running thence North 80 degrees 34' 30" east along said dividing line 135 feet to lot number 40; running thence South 9 degrees 25' 30" east along lots 40 and 41, 100 feet to lot number 17; running thence South 80 degrees 34' 30" west along the dividing line between lots 17 and 16, 135 feet to the easterly line of Mamaroneck Avenue; running thence North 9 degrees 25' 30" west along the easterly line of Mamaroneck Avenue 100 feet to the point or place of beginning.

\$96,357.79

ALL that lot of land, together with the building thereon, situate, lying and being in the City of White Plains, County of Westchester and State of New York, being known and designated as Lot Number 17 on a certain map entitled, "Map of Carhart Homestead, White Plains, Westchester Co. N. Y. property of Joshua M. Sprague", made by Byrne and Darling, Civil Engineers, dated June 1902 and filed in the Office of the Register of Westchester County June 16, 1902 in Volume 14 of Maps at page 73, and bounded and described as follows:

BEGINNING at a point on the easterly side of Mamaroneck Avenue distant 250.01 feet northerly as

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)****BOOK VALUE****Dollars Cents**

244 measured along the said easterly side of Mamaroneck Avenue from the corner formed by the intersection of the northerly side of Livingston Avenue with the easterly side of Mamaroneck Avenue; running thence along the northerly side of lot 18 as on said Map North 80 degrees 34' 30" East 135 feet to the westerly side of lot 42 as on said Map; running thence along the westerly side of said lot No. 42 North 9 degrees 25' 30" West 50 feet to the southerly side of Lot No. 16 as on said map; running thence along the southerly side of said lot No. 16 South 80 degrees 34' 30" West 135 feet to the easterly side of Mamaroneck Avenue; running thence along the said easterly side of Mamaroneck Avenue South 9 degrees 25' 30" East 50 feet to the point or place of beginning.

245 **TOGETHER** with all the right, title and interest of the party of the first part hereto, of, in and to the highway bounding the foregoing described premises in front to the center line thereof.

SUBJECT to covenants and restrictions of record inso-

246 far as the same affect the foregoing described premises.

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (1) (CONT'D)**

	BOOK VALUE		247
	Dollars	Cents	
SUBJECT to Zoning Regulations and Building Restrictions of the City of White Plains, New York, adopted by its Common Council.	\$53,025.32		
TOTAL	\$950,765.20		

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By FREDERICK M. SANDERS

Executive Vice-President

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SCHEDULE B. (2).**PERSONAL PROPERTY**

	AMOUNT		249
	Dollars	Cents	
a) Cash on Hand (petty cash account)	\$5,000.00		
Postage stamps	198.07		
TOTAL	\$	5,198.07	
a) (1) Cash for refund of taxes on deposit with National City Bank of New York	\$97.12		
Sinking Fund deposit with National City Bank, Trustee	60.14		
Stock—Bond—Scrip	8.50		
TOTAL	\$	165.76	

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (2) (CONT'D)

		AMOUNT	
		Dollars	Cents
50	(d) Office furniture and equipment (book value)	\$1,458.18	
	TOTAL	\$	1,458.18
	(b) MORTGAGES RECEIVABLE	BOOK VALUE	
		Dollars	Cents
	York Avenue and 85th St.—2nd Mtg.		
	6% Past due		
	Cost \$161,937.50 carried at	\$	1.00
	Breslin Hotel, B'way & 29th St. 1st Mtge.		
	3% from June 1, 1938 to May 31, 1942		
	4% from June 1, 1942 to May 31, 1957		
	Amortization payments as follows:		
	\$ 416.66 per Mo. from 7-1-38 to 6-1-39		
	2,500.00 per Mo. from 7-1-39 to 6-1-40		
	416.66 per Mo. from 7-1-40 to 6-1-57		
	when balance becomes due	520,833.40	
	Interest thereon to April 30, 1939	1,302.08	
	337-39 E. 49th St. 1st Mtge.		
	3½% from Mar. 1, 1938 to Mar. 1, 1940		
	4% from Mar. 1, 1940 to Mar. 1, 1943		
	Amortization payments of \$85.00 due		
	on June 1, 1939 and quarterly there-		
	after until Mar. 1, 1943 when balance		
	becomes due	34,000.00	
	Interest thereon to April 30, 1939	198.33	
	Whitehall Building,		
	17 Battery Place, New York, N. Y.		
	1st Mortgage—due 90 days after notice		
	and demand thereof	4,000.00	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (2) (CONT'D)**

	BOOK VALUE		253
	Dollars	Cents	
Interest at 6% Payable quarterly March, June, September and December 20th (pledged to secure \$3,000,000 Note of Petitioner to The National City Bank of New York as set forth on Schedule A-2 filed herewith)			
Interest thereon to April 30, 1939	\$	27,333.33	
NOTES RECEIVABLE:			
Trinity Buildings Corporation of New York, 111 Broadway, New York, N. Y. due June 1, 1939		8,781,192.44	254
Whitehall Improvement Corporation, 111 Broadway, New York, N. Y. Due June 30, 1939, Interest @ 2% payable monthly		3,675,945.59	
Interest thereon to April 30, 1939		6,126.58	
Lawyers Building Corporation, 10 State Street, Boston, Mass. Due on demand		1,274,059.46	
Plaza Operating Company, 111 Broadway, New York, N. Y. Due August 30, 1940 Interest @ 4% payable May 30, 1939 and quarterly thereafter		137,500.00	255
Interest thereon to April 30, 1939		45.84	

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (2) (CONT'D)

BOOK VALUE

Dollars Cents

(This note is pledged to secure Note payable
of Petitioner in like amount to Manufac-
turers Trust Company)

Plaza Operating Company,
111 Broadway, New York, N. Y.

Due on demand and it is subordinated to all
indebtedness of Plaza Operating Company
to Manufacturers Trust Company, and sub-
ject to an agreement with Manufacturers
Trust Company as to demand. (Principal
Amount \$3,930,000.00)

—0—

TOTAL \$18,458,538.05

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

SCHEDULE B. (3)

CHOSES IN ACTION

Description and Amount	PRINCIPAL AMOUNT	
	Dollars	Cents
Trinity Buildings Corporation of New York.		
111 Broadway, New York, N. Y.	1,661,760	87
Lawyers Building Corporation, 10 State Street, Boston, Mass.	25,000	00
M. Harris, 15-15½ Thames Street, New York.		

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONTD)**

Pix Theatres, Inc., White Plains, New York	62 50	259
Scharlin Sales Corporation, 405 East 32nd Street, New York, N. Y.	100 00	
Onarwa Realty Corporation, 25 Broad Street, New York, N. Y.	1,450 00	
Usall Realty Corporation, .25 Broad Street, New York, N. Y. \$432,864.43	—	260
Beaux-Arts Apartments, 310 East 44th Street, New York, N. Y.	2 46	
A. T. Black, 597 Madison Avenue, New York, N. Y.	1 05	
Copley-Plaza Operating Company, Boston, Mass.	13 51	
A. J. Flohr, 111 Broadway, New York, N. Y.	1 05	261
George A. Fuller Company, 597 Madison Avenue, New York, N. Y.	9 73	
Michael Harris, 15-15½ Thames Street, New York, N. Y.	15 86	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)****PRINCIPAL AMOUNT**
Dollars Cents**Hotel Breslin, Inc.****Broadway & 29th Street, New York,
N. Y.****3,929 50****Taxes paid for in advance in pursu-
ance to mortgage.****Lawyers Club,****115 Broadway, New York, N. Y.****102 17****George W. Martin,****111 Broadway, New York, N. Y.****90****BOOK VALUE****Description and Amount****Dollars Cents****Stock in
corporated
companies,****Interest in
Stock
companies and
negotiable
bonds****Trinity Buildings Corporation
of New York,****111 Broadway, New York, N. Y.****1,000 shares Capital Stock, without
par value, stated at****1,000,000.00****Whitehall Improvement Corporation,****111 Broadway, New York, N. Y.****5 shares Capital Stock, par value****\$100.00 per share.****500.00****Lawyers Building Corporation,****10 State Street, Boston, Mass.****100 shares Capital Stock, par value****\$100.00 per share.****10,000.00**

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

	BOOK VALUE		
	Dollars	Cents	
G. A. F. Realty Corporation (inactive) 111 Broadway, New York, N. Y. 5 shares Capital Stock, par value \$100.00 per share		500.00	265
George A. Fuller Company, 597 Madison Avenue, New York, N. Y. 7786 shares of 4% Cumulative Preferred Stock par value \$100.00 each		778,600.00	266
7893 shares Common Stock, par value \$1.00 each (of which 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock having a book value of \$737,067.00 are pledged to secure Note payable of Petitioner to Manufacturers Trust Company for \$137,500)		7,893.00	
Plaza Operating Company, 111 Broadway, New York, N. Y. 25,000 shares Preferred Stock,) Par Value \$100.00 each) 34,483 shares Common Stock,) Par Value \$1.00 each)			267
Copley-Plaza Operating Co. 150 shs. Capital Stock Cost \$15,000.00 carried at		1.00	
U. S. R. Management Corp. Capital Stock 5 shares at par		500.00	

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

	BOOK VALUE
	Dollars Cents
Van Sweringen Corp. 5,000 shs. No par stock carried at 1/16 quoted market value as at December 31, 1937	312.50

Alliance Realty Co. 3,509 shs. pfd. cost \$350,900.00 carried at 61½ quoted market value as at Dec. 31, 1938	22,808.50
-----------------------------------------------------------------------------------------------------------------------	-----------

	PRINCIPAL AMOUNT
Description and Amount	Dollars Cents
Irene McCauley, 111 Broadway, New York, N. Y.	\$3.11
National Hotel of Cuba, 111 Broadway, New York, N. Y.	141.83
Mrs. George M. Pynchon, 111 Broadway, New York, N. Y.	.60
H. B. Roters, 111 Broadway, New York, N. Y.	.65
Royal Eastern Electric Supply Co., 16 West 22nd Street, New York, N. Y.	6.00

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D).**

	PRINCIPAL AMOUNT		
	Dollars	Cents	
D.G. Scott, 111 Broadway, New York, N. Y.	18.70		271
Whitehall Lunch Club, 17 Battery Place, New York, N. Y.	100.00		
Description and Amount	BOOK VALUE		
	Dollars	Cents	
Alliance Realty Co. 38,649 shs. com. cost \$632,582.70 carried at 1/16 quoted market value as at Dec. 31, 1938	\$	2,415.56	272
Onarwa Realty Corp., 3 shs. cap. stock	300.00		
Stevens Hotel Corp. Voting Trust Certificates for 8,730 shs. of com. stock	1.00		
Robert & Minnie K. Kloeppel \$54,000 par value Second Mortgage Bonds carried at cost	48,600.00		273
Interest thereon to April 30, 1939	216.00		
Usall Realty Co. 3 shs. capital stock, carried at	1.00		

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (3) (CONTD)

BOOK VALUE

Dollars Cents

Beaux-Arts Apts. Inc

3,408 shs. 2nd pfd.) Cost \$307,075.00

Beaux-Arts Apts. Inc.

2,235 shs. Common) carried at 1.00

National Hotel of Cuba Corp.

14,156 shs. pfd.) Cost \$1,316,508.00

ditto

57,424 shs. com.) carried at 1.00

1107 Fifth Ave. Corp.

1,512 shs. pfd. \$151,200.00

Less—Reserve 151,200.00

Savoy-Plaza, Inc.:

\$179,000.00 par value income Bonds

and 2,112 shs. \$1.00 par value Class

"A" Common Stock V. T. C. carried

at 27 $\frac{3}{4}$ quoted market value at Dec.

31, 1938 \$49,672.50

27,350 shs. \$1.00 par

value Class "B" Com-

mon Stock V. T. C. car-

ried at 1.00

49,673.50

Fuller Building Corp. Voting Trust

Certificates representing 8,576 shs.

Class "B" Common Stock (Pledged

to secure certain Debentures as set

forth in Schedule A-2 filed herewith)

1.00

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

Description and Amount	Unearned Premiums
Unexpired portion:	
<i>Fire</i>	
Covering 15 and 15½ Thames St., New York, N. Y.	
California Insurance Co. Expires Jan. 24, 1940	6.66
Pearl Assurance Co. July 6, 1939	2.96
Pearl Assurance Co. Aug. 28, 1939	13.20
Covering East 49th St. and First Ave., New York, N. Y.	
Philadelphia Fire and Marine Insurance Co. Feb. 2, 1940	22.82
<i>General Liability</i>	74.78
15 and 15½ Thames St., New York, N. Y.	
Globe Indemnity Insurance Co. April 27, 1940	16.72
White Plains Property Employers Liability Assurance Corp. June 28, 1939	1.10
49th St. and First Ave. Employers Liability Assurance Corp. Dec. 23, 1939	135.28

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (3) (CONT'D)

280.

Unearned
Premiums*Plate Glass*

49th St. and First Ave.
Hartford Accident and Indemnity Co.
May 14, 1939

.6

Schedule Bond—All officers and em-
ployees

National Surety Corporation
June 7, 1939

46.6

281

Group Life. Equitable Life Assurance
Society of United States Jan. 1, 1940

4811.6

D. Unliqui-
dated. Claims
of every
nature with
their esti-
mated value.

NONE

282

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (3) (CONT'D)**

E. Deposits
of money in
banking insti-
tution and
elsewhere*

National City Bank, 55 Wall St., N. Y. C.	\$268,045.80	283
Chase National Bank, Pine & Nassau St., New York City.	4,181.78	
Chase National Bank, 115 Broadway, N. Y. C.	5,385.70	
First National Bank, 1 Wall St., N. Y. C.	5,482.20	
Marine Midland Trust Co., 17 Battery Place, New York City	6,321.81	
Central Hanover Trust Co., 70 Broad- way, N. Y. C.	4,631.61	284
Manufacturers Trust Company, 55 Broad Street, New York City	46,610.60	
National City Bank, Dividend Acct., 55 Wall Street, New York City	—	

Properties:

F. Real Estate
taxes paid in
advance.

15-15½ Thames St., New York, N. Y.	\$145.00
East 49th St. and First Ave., New York, N. Y.	1,469.33
White Plains property	323.68

UNITED STATES REALTY AND IMPROVEMENT COMPANY, 285

PETITIONER

By FREDERICK M. SANDERS
Executive Vice-President

* All bank balances are stated after deduction of
issued checks which have not been presented for pay-
ment.

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (4)**

PROPERTY IN REVERSION, REMAINDER OR EXPECTANCY, including Property held in Trust for the Debtor, or subject to any Power or Right to Dispose of, or to Charge.

N. B.—A particular description of each interest must be entered. If all or any of the Debtor's Property has been conveyed by Deed or Assignment, or otherwise, for the benefit of Creditors, the date of such Deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the Debtor.

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (4) CONT'D)

GENERAL INTEREST	PARTICULAR DESCRIPTION	SUPPOSED VALUE OF INTEREST	289
Interest Land	None	Dollars Cents	289
Personal Property	None		
Property Money,			
Stocks, Bonds,			
Annuities, etc.	None		290
Rights and Easements,			
Graciously Requests	None		
Property Conveyed		AMOUNT REALIZED FROM PROCEEDS OF PROPERTY CONVEYED	
Benefit Creditors.		Dollars Cents	
That portion Debtor's			
Property has been conveyed			291
Deed or Assignment,			
Otherwise benefit of			
Creditors; or of			
By Deed, or and express of			

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (4) (CONT'D)**

292	GENERAL INTEREST	PARTICULAR DESCRIPTION	AMOUNT REALIZED FROM PROCEEDS OF PROPERTY CONVEYED
			Dollars Cents
	party to whom con- veyed, amount real- ized therefrom, disposal of same, so far as known to the Debtor.	None	
293	What sum or sums have been paid to Counsel, and to whom, for service ren- dered or to be rendered in this Bankruptcy.	None	

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

294

By **FREDERICK M. SANDERS**
Executive Vice-President

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (5)**

A PARTICULAR STATEMENT of the property claimed as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and if any portion of it is Real Estate, its location, description and present use.

295

Military
Uniforms,
Arms and
Equipment.

None

VALUATION
Dollars Cents

296

Property
claimed to
be exempted
by State
laws; its
valuation;
whether real
or personal;
its descrip-
tion, and
present use;
and reference
given to the
Statute of
the State
treating the
exemption.

None

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UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

*Debtor's Petition for Arrangement: Exhibits D and E.***SCHEDULE B. (6)****BOOKS, PAPERS, DEEDS AND WRITINGS
RELATING TO BANKRUPT'S BUSINESS AND
ESTATE.**

The following is a True List of all Books, Papers, Deeds and Writings relating to my Trade, Business, Dealings, Estate and Effects, or any part thereof, which at the date of this Petition, are in my possession or under my custody and control, or which are in the Possession or Custody of any Person in Trust for me, or for my Use, Benefit, or Advantage; and also of all others which may have been heretofore, at any time in my Possession, or under my custody or Control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same:

BOOKS.

Cash Receipts
Cash Disbursements
Voucher Register
General Journal
General Ledger
Interest Receivable Accrual Book
Interest Payable Accrual Book
Miscellaneous Corporate Books

Debtor's Petition for Arrangement: Exhibits D and E.

SCHEDULE B. (6) (CONT'D)

All in the possession of the Company.

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EDS,

PERS,
C.

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY,**

PETITIONER

By **FREDERICK M. SANDERS**
Executive Vice-President

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[Verification to Schedule B]

SUMMARY OF DEBTS AND ASSETS

From the Statements of the Bankrupt in Schedules
A and B.

Schedule A

" "

" "

" "

1 (1) Taxes and Debts due United States	\$2,037.47
1 (2) Taxes due States, Counties, Districts & Municipalities	1,098.75
2 Secured Claims	5,529,759.18
3 Unsecured Claims	6,089.65

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SCHEDULE A, TOTAL \$5,538,985.05

*Debtor's Petition for Arrangement: Exhibits D and E.***SUMMARY OF DEBTS AND ASSETS (CONT'D)**

le B	1	Real Estate	\$950,765.20
"	2-a	Cash on hand	5,198.07
"	2-a-1	Cash on deposit for refund of taxes, Sinking Fund, and Stock and Bond Scrip	165.76
"	2-b	Bills, Promissory Notes and Securities and Mortgages Receivable	18,458,538.05
"	2-d	Household Goods, &c. Office Furniture and Equipment at Book Value	1,458.18
"	3-a	Debts due on Open Accounts	1,692,830.49
"	3-b	Stocks, Negotiable Bonds, &c.	1,922,326.06
"	3-c	Policies of Insurance	5,109.58
"	3-e	Deposits of Money in banks and elsewhere	340,659.50
"	3-f	Real Estate Taxes Paid in Advance	1,938.01

SCHEDULE B, TOTAL \$23,378,988.90

The amounts shown in the summary of the schedules with respect to assets hereinabove set forth are book values and do not purport to be market or realizable values. Some of the assets are carried at amounts greatly in excess of the market or realizable values and, undoubtedly, some have values in excess of the amounts at which they are carried.

In addition, the foregoing summary does not contain Schedule A-6 which contains contingent liabilities in excess of \$3,900,000.00, and which includes the liability of the Debtor on its guarantee of the First Mortgage Loan of Trinity Buildings Corporation of New York, which is the subject of the Arrangement proceedings presently instituted.

UNITED STATES REALTY AND IMPROVEMENT
COMPANY,

PETITIONER

By **FREDERICK M. SANDERS**

*Debtor's Petition for Arrangement.***Exhibit G.****STATEMENT OF AFFAIRS**

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(Note: ~~Each~~ question should be answered or the failure to answer explained. If the answer is "none", this should be stated. If additional space is needed for the answer to any question, a separate sheet properly identified and made a part hereof, should be used and attached.

If the bankrupt or debtor is a partnership or a corporation, the questions shall be deemed to be addressed to, and shall be answered on behalf of, the partnership or corporation; and the statement shall be verified by a member of the partnership or by a duly authorized officer of the corporation.

The term, "original petition", as used in the following questions, shall mean the petition filed under Section 3b or 4a of Chapter III, Section 322 of Chapter XI, Section 422 of Chapter XII, or Section 622 of Chapter XIII.)

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1. *Nature, location and name of business*

a. What business are you engaged in?

The Company is a holding and operating company owning, operating and managing real and personal property and holding securities of other companies, its principal investments being in companies engaged in the real estate, hotel and building contracting business.

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b. Where, and under what name, do you carry on such business?

111 Broadway, New York, N.Y.

United States Realty and Improvement Company.

Debtor's Petition for Arrangement: Exhibit G.

c. When did you commence such business?

The Company was organized in 1904 and held its first meeting of directors on May 31, 1904.

d. Where else, and under what other names, have you carried on business within the six years immediately preceding the filing of the original petition herein?

The Company has never carried on business under any other name and has not carried on business at any other place within the six years immediately preceding the filing of the annexed Petition, except that it has maintained a branch office at 17 Battery Place, New York, N.Y. and up to 1936 another branch office at 597 Madison Avenue, New York, N.Y.

2. *Books and records*

a. By whom, or under whose supervision, have your books of account and records been kept during the two years immediately preceding the filing of the original Petition herein?

Arthus J. Flohr, Treasurer of the Company.

b. By whom have your books of account and records been audited during the two years immediately preceding the filing of the original Petition herein?

No detailed audit of the Company's transactions has been made within the last two years but the books of account, records and balance sheets of the Company have been tested, examined, re-

Debtor's Petition for Arrangement: Exhibit G.

viewed and certified to by Arthur Andersen & Company, 67 Wall Street, New York, N.Y., for each of said years.

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- c. In whose possession are your books of account and records.

In the possession of the Company.

3. *Financial Statements*

- a. Have you issued any financial statements within the two years immediately preceding the filing of the original Petition herein.

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The only financial statements which the Company has issued during the last years are consolidated balance sheet of the Company and its subsidiaries (exclusive of Plaza Operating Company) and consolidated income and deficit accounts for each of the years ending December 31, 1937 and December 31, 1938 which have all been sent to stockholders; quarterly statements of earnings have been issued to the press; individual balance sheets and income statements have been filed by the Company in connection with its income and franchise tax returns to the Federal Government and to the State of New York; all financial statements required by the Securities Exchange Act of 1934 have been filed during the past two years and also financial statements required under the Securities Act of 1933 for the registration of 63,000 shares of Capital Stock of the Company were issued and filed in 1937. The fiscal year of the Com-

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Debtor's Petition for Arrangement: Exhibit G.

pany since January 1, 1930 has been the calendar year.

4. Inventories

The property of the Company, consisting principally of real estate and securities is not the subject of an inventory. Tangible personal property consists only of office furniture and equipment of a value of not in excess of \$2,000. and no inventory as such is made thereof.

- a. When was the last inventory of your property taken?
- b. By whom, or under whose supervision, was this inventory taken?
- c. What was the amount, in dollars, of the inventory?
- d. When was the next prior inventory of your property taken?
- e. By whom, or under whose supervision, was this inventory taken?
- f. What was the amount, in dollars, of the inventory?
- g. In whose possession are the records of the two inventories above referred to?

5. Income other than from operation of business

- a. What amount of income, other than from the operation of your business, have you received during each

Debtor's Petition for Arrangement: Exhibit G.

of the two years immediately preceding the filing of the original Petition herein?

The Company collected in settlement of an action for a breach of contract for subway construction, commenced many years ago against the City of New York, the sum of \$12,000 in June 1938.

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6. *Income tax returns*

- a. Where did you file your last Federal and State income tax returns, and for what years.

The last Federal income tax return of the Company was filed on June 15, 1938 at the Custom House, New York, N.Y., Second District of New York for the year 1937. A tentative return for Federal income tax for the year 1938 was filed on March 15, 1939 and the time for filing of the final return has been extended to June 15, 1939.

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The Company does not pay an income tax to the State of New York but pays a New York State franchise tax. The return for New York State franchise tax purposes for the year beginning November 1, 1938 was filed on July 14, 1938. A tentative return for the year beginning November 1, 1939 was filed on May 10, 1939 and the time to file the final return has been extended to July 15, 1939.

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7. *Bank accounts and safe deposit boxes*

- a. What bank accounts have you maintained, alone or together with any other person, and in your own or

Debtor's Petition for Arrangement: Exhibit G.

any other name, within the two years immediately preceding the filing of the original Petition herein?

Since May 29, 1938 the Company has maintained bank accounts in its own name in the following banks in New York City.

National City Bank of New York, 55 Wall St.;
 National City Bank of New York, 55 Wall St.,
 Dividend Account;
 Chase National Bank of the City of New York,
 18 Pine St.;
 Chase National Bank of the City of New York,
 Mercantile Branch, 115 Broadway;
 First National Bank, 2 Wall St.;
 Marine Midland Trust Company, 17 Battery
 Place;
 Central Hanover Bank and Trust Company, 60
 Broadway;
 Manufacturers Trust Company, 55 Broad St.

During such period the Company has not maintained any bank account with any other persons or in any other name.

- b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash or other valuables, within the two years immediately preceding the filing of the original Petition herein?

The Company maintains a safe deposit box in Chase Safe Deposit Company, 115 Broadway, New York, N. Y.

*Debtor's Petition for Arrangement: Exhibit G.*8. *Property held in trust*

- a. What property do you hold in trust for any other person?

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None.

9. *Prior bankruptcy or other proceedings; assignments for benefit of creditors*

- a. What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original Petition herein?

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None.

- b. Was any of your property, at the time of the filing of the original Petition herein, in the hands of a receiver or trustee?

None except as ~~Trustee~~ of Indentures.

- c. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original Petition herein?

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None.

10. *Loans repaid*

- a. What repayments of loans have you made during the year immediately preceding the filing of the original Petition herein?

Debtor's Petition for Arrangement: Exhibit G.

During the past year the Company has made the following payments:

\$332,879.68 to the National City Bank of New York in payment of a note;

\$150,600 to Manufacturers Trust Company on account of a note;

\$5,000 to holders of debentures of the Company which became due on February 1, 1938 but which were presented for payment at a later date.

During the year the Company purchased \$12,000 principal amount of its outstanding debentures, due 1944, and of the 6% debentures of G. A. F. Realty Corporation guaranteed by it for a total amount of \$3,685.00. Such debentures are now held in the treasury.

During the year the Company paid, pursuant to the provisions of a sinking fund, \$79,500 on account of its outstanding 6% Debentures, due 1944. Such payment, however, was made by depositing such Debentures which had been purchased in the open market for a lesser amount.

During the year the Company paid, pursuant to the provisions of a sinking fund, \$150,000 on account of the aforesaid 6% Debentures of G. A. F. Realty Corporation guaranteed by it. Such payment was made with Debentures received in exchange for the 6% Debentures of the Company, pursuant to a Plan of Reorganization of G. A. F. Realty Corporation under Section 77B of the

Debtor's Petition for Arrangement: Exhibit G.

Bankruptcy Act consummated in 1936. The bonds used for this payment were exchanged prior to May 1, 1938.

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11. *Transfer of property*

- a. What property have you transferred or disposed of, other than in the ordinary course of business, during the year immediately preceding the filing of the original Petition herein?

63,000 shares of Capital Stock of the Company, formerly held in the treasury, were sold to the public after having been registered under the Securities Act of 1933.

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2,000 shares of Common Stock of George A. Fuller Company were sold to Lou R. Crandall, the President, under an agreement providing for his services in such capacity.

12. *Accounts receivable*

- a. Have you assigned any of your accounts receivable during the year immediately preceding the filing of the original Petition herein?

None.

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13. *Losses*

- a. Have you suffered any losses from fire, theft or gambling during the year immediately preceding the filing of the Petition herein?

None.

*Debtor's Petition for Arrangement: Exhibit G.***Withdrawals.**

- a. What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceding the filing of the original Petition herein?

None except certain minor charges on the books of the Company as set forth in Schedule B.(3) of the schedule filed herewith and except salaries paid to officers during the year immediately preceding the filing of the Petition as follows:

Frederick M. Sanders, Executive Vice President, Secretary and Director	\$10,416.67
Arthur J. Flohr, Vice President, Treasurer and Director	\$ 7,250.00
Douglas Grant Scott, Vice President	\$ 1,000.00
Christian R. Burmeister, Comptroller	\$ 958.33

In addition, Directors, who are not officers receiving a salary, received \$25 for each meeting they attended. The amount received by each Director is as follows:

Edwin J. Beinecke	\$175.00
Harry Bronner	200.00
Edward F. Barrett	200.00
Lou R. Crandall	225.00
Clarke C. Dailey	225.00

Debtor's Petition for Arrangement: Exhibit G.

L. Boyd Hatch	200.00
Otto Marx	250.00
John Reis	100.00
Henry C. Von Elm	175.00

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It is to be noted that some of the foregoing officers and certain other officers of the Company received their salaries either in whole or in part from wholly owned subsidiaries of the Company as an operating expense of such subsidiaries.

15. *Members of partnership, officers, directors, managers, and principal stockholders of corporation*

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- a. What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent or more of the issued and outstanding stock, of the corporation?

Officers

Edwin J. Beinecke, President, 111 Broadway,
New York, N.Y.

Frederick M. Sanders, Executive Vice President
and Secretary, 111 Broadway, New York, N.Y.

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D. Grant Scott, Vice President, 111 Broadway,
New York, N.Y.

Arthur J. Flohr, Vice President and Treasurer,
111 Broadway, New York, N.Y.

C. R. Burmeister, Comptroller, 111 Broadway,
New York, N.Y.

*Debtor's Petition for Arrangement: Exhibit G.**Directors*

Edwin J. Beinecke, 111 Broadway, New York, N. Y.
 Edward F. Barrett, 50 Church St., New York, N. Y.
 Harry Bronner, 38 Wall Street, New York, N. Y.
 Lou R. Crandall, 595 Madison Avenue, New York, N. Y.
 Clarke G. Dailey, 115 Broadway, New York, N. Y.
 Arthur J. Flohr, 111 Broadway, New York, N. Y.
 L. Boyd Hatch, 1 Exchange Place, Jersey City, New Jersey
 Otto Marx, 25 Broad Street, New York, N. Y.
 John Reis, P. O. Box 370, Summerville, S. C.
 Frederick M. Sanders, 111 Broadway, New York, N. Y.
 Henry C. Von Elm, 55 Broad Street, New York, N. Y.

There is no stockholder holding 25% or more of the issued and outstanding stock of the Company.

FREDERICK M. SANDERS (sgd)
 Executive Vice-President
 United States Realty and Improvement
 Company

[Verification]

Debtor's Petition for Arrangement.

Exhibit H.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,

Debtor.

In Proceedings for an
Arrangement
No. 74023

AFFIDAVIT PURSUANT TO RULE XI-2

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FREDERICK M. SANDERS, being duly sworn, deposes and says, that he is Executive Vice President and Secretary of United States Realty and Improvement Company, the Debtor herein, and does further depose and say:

(1) Whether the Debtor is occupying any premises under a lease, and if he is, a statement as to the length of the term, the rent reserved, the amount due and owing for rent and what negotiations for a modification of the lease have been had, if any, with whom, and the present status thereof.

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The Debtor is occupying space in the Trinity Building, 111 Broadway, New York, N. Y. under a lease from May 1, 1939 to April 30, 1940, the tenant having the privilege of canceling the same at the end of any month during said term on ten days' prior written notice. The rental is \$8,822.00 per year, payable monthly in advance, and the instalment payable May 1, 1939 has been paid. There is no amount presently due and owing thereon.

Debtor's Petition for Arrangement: Exhibit H.

and there have been no negotiations for a modification thereof. Such lease is in full force and effect.

(2) Whether or not any creditors' committee has been designated by the Debtor's creditors and, if so, the names and addresses of the members of such committee.

No creditors committee has been designated in accordance with Chapter XI of the Bankruptcy Act.

There are, however, according to notices in newspapers and circulars, two committees, one known as "Trinity Buildings Corporation Bondholders Committee", consisting of James A. Beha, David G. Baird, Peter E. Bennett, Lloyd Lubetkin and Eugene W. Potter, the Secretary of which is John P. Dailey, 120 Broadway, New York, N. Y., and the counsel for which is Simpson, Thacher and Bartlett; and the other known as "Trinity Buildings Corporation of New York Mortgage Certificate Bondholders Committee", consisting of Peter Grimm, Charles F. Simmons, Erwin Stugard, Leonard A. Wales and Guy Wheeler, the Secretary of which is Douglas G. Wagner, 40 Exchange Place, and the counsel for which is Ralph Montgomery Arkush.

Deponent has no knowledge or information, sufficient to form a belief, as to whether either of said committees, or any members thereof, either are or represent creditors of the Debtor.

(3) If the Debtor desires to continue the operation of the business:

(a) The estimated amount of the weekly payroll to employees (exclusive of the officers, stockholders and directors, if a corporation) for a period of thirty days

Debtor's Petition for Arrangement: Exhibit H.

following the filing of the Petition proposing an Arrangement.

The estimated weekly payroll of employees of the Debtor for the next thirty days is at the rate of \$375.00 per week, exclusive of officers, stockholders or directors.

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(b) The amounts now being paid and proposed to be paid for services for a period of thirty days following the filing of the Petition proposing an Arrangement:

(1) if a corporation, to officers, stockholders or directors:

The amounts now being paid and proposed to be paid for services for a period of thirty days following the filing of the Petition to officers, stockholders and directors are as follows:

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F. M. Sanders, Executive Vice President, Secretary, Director and Stockholder, at the rate of \$750 per month;

Arthur J. Flohr, Vice President, Treasurer, Director and stockholder, at the rate of \$500 per month;

Mary Rittenband, Stenographer and Stockholder, at the rate of \$32 a week;

Henry B. Roters, Clerk and Stockholder, at the rate of \$61 a week;

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Sadie McNally, Typist and Stockholder, at the rate of \$32 a week;

Frank X. Tracey, Clerk and Stockholder, at the rate of \$48 a week.

In addition the Debtor pays to its directors who are not officers and receiving a salary in such capacity, \$25 for each meeting which they attend.

Debtor's Petition for Arrangement: Exhibit H.

(2) if an individual or a partnership, to the individual or the members of the partnership.

Not applicable.

(4) The estimated additional operating expenses for the period of thirty days following the filing of the Arrangement Petition.

The estimated actual operating expenses in addition to the salaries above mentioned for the period of the next thirty days should consist principally of office rent and general office expense, such as telephone, etc., and should not amount to more than \$1,000. However, on an accrual basis the Debtor will have to accrue the interest on outstanding Debentures and bank loans, taxes on real estate, etc., none of which are to be paid during the next thirty days and which would probably on the accrual basis amount to several thousand dollars.

(5) The estimated gain or loss in the operation of the Debtor's business for a period of thirty days following the filing of the Arrangement Petition.

It is estimated that the accrued income would exceed accrued expenses for the next thirty days by approximately \$6700.00. However, the following month it is estimated will probably show a loss of \$2,000.00. The Debtor on the accrual basis has not had an income for in excess of the past three years but has consistently shown a loss by reason of the conditions in real estate in the financial district of New York.

(6) Such additional information as may fully inform the Court relative to the desirability of the Debtor continuing business.

The sole purpose of the Arrangement and the proceedings instituted under the annexed Petition is to

Debtor's Petition for Arrangement: Exhibit H.

modify and extend the terms of the existing guarantee by the Debtor of the First Mortgage Loan on Trinity Buildings Corporation of New York and the share certificates therein. Inasmuch as consents to the Arrangement have been received from a considerable number of holders of rights under such guarantee, it is proposed that the Debtor continue its business as heretofore meeting all of its liabilities and obligations as the same become due, with the exception of its aforesaid guarantee. It is inadvisable, on information and belief, and would be detrimental to discontinue or interrupt the business of the Debtor since all creditors and stockholders would suffer thereby. It is also unnecessary, on information and belief, to have a trustee or receiver appointed since the Debtor proposes to continue its business as in the past and the Arrangement merely contemplates the extension and modification of one obligation of the Debtor.

FREDERICK M. SANDERS (sgd)

Sworn to before me this

24th day of May, 1939.

HENRY M. MARX (sgd)

Notary Public, Westchester County

Certificate Filed in New York County

N. Y. Co. Clk's No. 170, Reg. No. 0M150

Bronx Co. Clk's No. 21, Reg. No. 44-M-40

Kings Co. Clk's No. 158, Reg. No. 164

Commission expires March 30, 1940

(Notarial Seal)

[Exhibits F and I attached to Debtor's Petition for an Arrangement have been omitted, pursuant to stipulation.]

**Order Approving Debtor's Petition for
Arrangement, Dated May 31, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings for an Arrangement
No. 74023

[SAME TITLE]

Upon reading and filing the annexed Petition of United States Realty and Improvement Company, verified by Edwin J. Beinecke, President, on the 31st day of May, 1939, and the Exhibits and Schedules thereto affixed, and after hearing White & Case, counsel for the Debtor; it is

FOUND; ,

1. United States Realty and Improvement Company is a Debtor within the definition of Section 306 (3) of the Bankruptcy Act.

2. The aforesaid Petition of the Debtor has been properly filed under Section 322 of the Bankruptcy Act.

3. The Schedules annexed to said Petition, marked D, E, F, G and H, are full compliance with the provisions of Chapter XI of the Bankruptcy Act, the General Orders in Bankruptcy and the General Bankruptcy Rules of this Court. Until further order of this Court no other schedules or exhibits need be filed. In addition, the Petition complies with Sections 323 and 324 of the Bankruptcy Act.

Therefore, it is

*Order Approving Debtor's Petition for
Arrangement.*

ORDERED, ADJUDGED AND DECREED THAT:

4. Until further order of the Court the Debtor shall continue in possession and control of its assets and properties of whatever description and wheresoever situate, subject to the control of this Court. During such possession by the Debtor and until further order of the Court the officers and directors of the Debtor shall be entitled to receive salary and compensation from the Debtor at the same rate as heretofore (as set forth in Exhibit G, Statement of Affairs, annexed to the said Petition) and no other officer or director of the Debtor shall be entitled to receive any compensation nor shall any persons be elected or appointed to any office of the Debtor or to fill any vacancy or otherwise in such office without the prior approval of the Court. The employees of the Debtor shall continue to receive compensation as heretofore but without increase.

5. The Debtor be and hereby is authorized and directed until further order of the Court to continue its business and to operate, conduct and manage its assets, property and business wherever situate and to that end to exercise its authorities and franchises and discharge all duties obligatory upon it and to collect and receive the income, rents, tolls, issues and profits of its business, to collect in due course all outstanding accounts and all interest and dividends on securities belonging to it and to pay in due course all obligations and liabilities of the Debtor, whether incurred before or after the date of this Order with the sole exception of any liability or obligation with respect to its Guarantee dated June 1, 1919, of Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Gold Loan, due June 1, 1939, and the Share Certificates therein. Further-

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*Order Approving Debtor's Petition for
Arrangement.*

more, the Debtor be and hereby is authorized and directed until further order of this Court to lease or sell any and all its property, real or personal, upon such terms and conditions as the Debtor may in the ordinary course of business deem proper and advisable for the operation and conduct of its business.

6 6 Until further order of this Court, Guaranty Trust Company of New York, as mortgagee, and all holders of share certificates and coupons in the aforesaid Trinity Buildings Corporation of New York First Mortgage Twenty-Year Five and One-Half Per Cent Gold Loan, their successors and assigns and all persons, firms or corporations claiming by, under or through them or any of them, are hereby severally and respectively enjoined and barred from prosecuting or continuing against the Debtor, except in this proceeding, or against any of the assets of the Debtor, any suit or proceeding arising out of or based upon the aforesaid Guarantee, Loan or share certificates therein and from levying any attachments, executions or other processes upon or against any of the property constituting the Estate of the Debtor or taking or attempting to take into their possession any part of the property constituting the Estate of the Debtor or from doing any act whatsoever to interfere with the possession, operation or management by the Debtor of the property and business constituting the Estate or interfering in any manner with the directors, officers, managers, agents or employees of the Debtor in the discharge of their duties or interfering in any manner with the administration and disposition of the affairs and properties constituting the Estate of the Debtor: provided, however, that this injunction expressly shall not bar any persons, firms or corporations other than those whose claims are based upon the aforesaid Guarantee, Loan or share-

*Order Approving Debtor's Petition for
Arrangement.*

certificates therein) from prosecuting such suits and taking such action against the Debtor and its property as they may desire.

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7. A meeting of creditors shall be held before this Court in Room 1105, United States Court House, Foley Square, Borough of Manhattan, New York, N. Y., on June 28, 1939, at 3 o'clock P. M., Eastern Daylight Saving Time, or as soon thereafter as counsel can be heard, at which meeting:

(a) proofs of claim shall be received and allowed or disallowed;

(b) the Debtor shall be examined and witnesses heard on any matter relevant to the proceeding;

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(c) written acceptances on the proposed Arrangement of creditors affected by the Arrangement shall be received and determined, and

(d) All parties shall show cause why the following matters hereby provisionally determined should not be made final:

(i) determine the sole persons affected by the Arrangement are holders of rights under the aforesaid Guarantee;

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(ii) for the purpose of the Arrangement and its acceptance, the division of creditors into classes is as follows:

(a) creditors entitled to realize under the Guarantee;

Order Approving Debtor's Petition for Arrangement.

(b) all other creditors (not affected by the Arrangement) ;

(iii) any proof of claim filed by Guaranty Trust Company of New York under the aforesaid Guarantee shall not be considered in computing for the purposes of the Arrangement and its acceptance the number and amount of acceptances and the number and amount of proofs of claim filed with respect to such Guarantee;

(iv) the Arrangement be confirmed upon a showing of proper compliance with the Bankruptcy Act;

(v) The form of Guarantee as annexed to the Arrangement as Exhibit A be approved and the execution of the same be authorized;

(vi) the consummation of the Arrangement be ordered.

(c) said meeting may be adjourned from time to time without other notice than by announcement at said meeting of any adjournment thereof.

8. The Debtor is hereby authorized to file with the Court an application for the confirmation of the Arrangement; by filing a petition showing compliance with Section 362 of the Bankruptcy Act within 15 days of the date hereof or such other period as may be further ordered by the Court, and if such application for confirmation of the Arrangement is so filed, the hearing on the confirmation or any objections to the

*Order Approving Debtor's Petition for
Arrangement.*

confirmation will be held at the first meeting of creditors hereinabove ordered.

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9. The Debtor within ten days of the entry hereof is hereby authorized and directed (a) to deposit or cause to be deposited in the United States mail, postage prepaid, a copy of a notice in substantially the form annexed hereto as Exhibit I, in envelopes addressed to all known creditors and stockholders of the Debtor, and (b) to cause to be published once in the Daily News Record and the New York Herald Tribune such form of notice.

Such notice where mailed shall be accompanied by a copy of the proposed Arrangement, a summary of the liabilities as shown by the Schedules and a summary of the assets as shown by the Schedules.

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The foregoing mailing and publication of notice be and hereby is held to be proper and sufficient notice in compliance with the provisions of Chapter XI of the Bankruptcy Act.

10. A copy of the foregoing notice and of this order and the Petition of the Debtor with respect thereto, including all exhibits, shall be mailed by the Debtor to the Secretary of the Treasury of the United States by registered mail at least fifteen days prior to the date of the hearing hereinabove provided for.

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11. Until further order of the Court the Debtor be and hereby is exempted from the provisions of Rule XI(8) and the Debtor is hereby directed in lieu of the requirements of such Rule to file a report and summary of the operations of its business at the termination of these proceedings.

Dated: May 31, 1939.

Vincent L. Leibell
U. S. D. J.

**Memorandum and Outline of Securities and
Exchange Commission, Dated July 5, 1939.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Proceedings for an Arrangement

No. 74023

[SAME TITLE]

MEMORANDUM.

SIRS:

On Friday afternoon, June 30, 1939, representatives of the Securities and Exchange Commission conferred with Judge Vincent L. Leibell concerning the proceeding which the United States Realty and Improvement Company has instituted under Chapter XI of the Bankruptcy Act. Judge Leibell stated that he would permit the Commission to appear in the proceeding *as amicus curiae* to present its views therein.

Judge Leibell requested that you be informed of these facts, and also that we advise you of the points which the Commission will advance at the adjourned hearing on confirmation of the proposed Arrangement on July 7, 1939. While, in view of the extended Governmental holiday, it has been impossible to complete a comprehensive brief in time for the hearing, we have prepared for your information the attached outline of the Commission's arguments.

Permission to submit a brief to the Court, with the usual opportunity for the submission of answering briefs, will be requested at the conclusion of the oral presentation of the Commission's views.

*Memorandum and Outline of Securities and
Exchange Commission.*

Dated New York, N. Y., July 5, 1939.

Yours, etc.,

379

EDMUND BURKE, Jr.

Edmund Burke, Jr.

J. ANTHONY PANUCH

J. Anthony Panuch

Attorneys for

SECURITIES AND EXCHANGE COMMISSION

Office and Post Office Address:

120 Broadway,

380

Borough of Manhattan,

City of New York, N. Y.

To:

White & Case, Esqs.,
14 Wall Street,
New York, N. Y.

Simpson, Thacher & Bartlett, Esqs.,
120 Broadway,
New York, N. Y.

Ralph Montgomery Arkush, Esq.,
15 Broad Street,
New York, N. Y.

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William E. Bardusch, Esq.,
63 Wall Street,
New York, N. Y.

*Memorandum and Outline of Securities and
Exchange Commission.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings for an Arrangement
No. 74023

[SAME TITLE]

OUTLINE OF MATTERS TO BE DISCUSSED BY THE
SECURITIES AND EXCHANGE COMMISSION

It is the Commission's view that the matters hereinafter stated lead to the conclusion (1) that the order of the Court dated May 31, 1939, finding that the debtor's petition was properly filed under Chapter XI of the Bankruptcy Act, should be vacated; (2) that confirmation of the debtor's proposed arrangement should be denied as not for the best interests of creditors; as not fair and equitable, or feasible; and as not proposed in good faith; and (3) that the petition and the proceeding should be dismissed.

I. The United States Realty and Improvement Company may not properly file a petition under Chapter XI. The "arrangement" procedure provided by that Chapter is not appropriate to the reorganization of corporations with securities in the hands of the public.

A. Consideration and comparison of the legislative history of Chapters X and XI demonstrate, among other things:

(1) That Chapter XI amends and revises the "composition" and "extension" procedures formerly contained in Sections 12 and 74 of the Bankruptcy Act; and that it is intended to be applicable to individuals and to the small, closely-held corporation in which there is no public investor interest;

*Memorandum and Outline of Securities and
Exchange Commission.*

(2) that Chapter X is the only chapter of the Bankruptcy Act, as amended, which contains adequate machinery for the "reorganization" for the large corporation in which there is a public interest; and that Chapter X is the only chapter of the Bankruptcy Act, as amended, which was intended to provide a "reorganization" procedure for the large corporation with publicly held securities;

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(3) that Chapter X thoroughly revised the machinery for "corporate reorganizations", as it formerly existed in Section 77B, and introduced additional measures into the reorganization system for the express purpose of enabling the courts to afford more complete protection to the investing public; and

386

(4) that such amendatory provisions have not been introduced into Chapter XI; and that this is consistent with the legislative understanding and intention that corporations with a public investor interest would be reorganized not under Chapter XI, but under Chapter X.

II. The absence of a specific restriction in Chapter XI does not permit corporations with publicly held securities to file petitions or effect arrangements under Chapter XI, for it has frequently been held that a statute will not be construed by the courts to include a case which, though within the literal meaning of the statute, was not within the aim or intention of the legislature.*

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* E. g., *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892); *American Security Co. v. District of Columbia*, 224 U. S. 491 (1911).

*Memorandum and Outline of Securities and
Exchange Commission.*

88 Similarly, under the provisions of Section 77B, the federal courts have dismissed proceedings as not filed in "good faith" where they had jurisdiction by a literal reading of the statute, but deemed the exercise of that jurisdiction improper and beyond the intentment of the statute.

III. The "arrangement" procedure provided by Chapter XI is not properly available to a corporation which has a preponderance of publicly held secured obligations and stock interests.

89 A. An arrangement under Chapter XI may provide for the settlement, satisfaction, or extension of unsecured debts only. Secured obligations and stock interests cannot be modified directly in a Chapter XI proceeding.

B. A corporation cannot isolate a contingent unsecured obligation for purposes of an arrangement under Chapter XI and leave its major indebtedness unaffected without regard for its financial requirements.

C. Secured obligations and stock interests may be modified under Chapter X. In a Chapter X proceeding, therefore, the debtor's debt and capital structure could be reorganized in a proper, satisfactory, and equitable fashion.

90 IV. If the debtor corporation has resort, as contemplated by Congress and the statute, to Chapter X, instead of to Chapter XI, it would be possible to subject both the primary obligor and the guarantor to the jurisdiction of the federal court, with the consequence that the court could consider the matter in the aggregate, uniform standards could be applied, simultaneous action could be obtained, and parallel results could be produced.

*Memorandum and Outline of Securities and
Exchange Commission.*

V. When considered in light of the above, the proposals here intended to be accomplished by the debtor are clearly not "fair and equitable", or "for the best interests of creditors", and the procedure to which it has resorted does not meet the test of good faith.

391

VI. The statutory requirements of "good faith" are not established in a case in which a debtor attempts to avoid the policy of Congress, adopted in the interests of public security holders and embodied in Chapter X of the Bankruptcy Act, by resort to another, and inappropriate, chapter of that Act. Any doubts concerning the construction of Chapter XI should be resolved in the interests of public security holders, and the court has full power to do so.

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Respectfully submitted,

EDMUND BURKE, JR.
Edmund Burke, Jr.

J. ANTHONY PANUCH
J. Anthony Panuch

Attorneys for
SECURITIES AND EXCHANGE COMMISSION

393

**Order to Show Cause re Intervention,
Dated July 18, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of
**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**
Debtor

**SECURITIES AND EXCHANGE
COMMISSION,**
Applicant for
Intervention

In Proceedings for an
Arrangement
No. 74023

**ORDER TO SHOW
CAUSE**

Upon the annexed motion of the Securities and Exchange Commission, it is

ORDERED that the debtor, Guaranty Trust Company of New York, and the committees who have heretofore intervened in this proceeding, show cause before me in Room 506, in the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 20th day of July, 1939, at 4:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an order should not be made granting to the Securities and Exchange Commission leave to intervene in this proceeding, and for such other and further relief as to the court may seem proper.

AND IT IS FURTHER ORDERED that service of a copy of this order to show cause and of the papers upon which it is granted upon the attorneys for the above named persons on or before the 18th day of July, 1939, at 5:00 P. M., shall be sufficient.

Dated, New York, N. Y., July 18th, 1939.

Vincent L. Leibell
U. S. D. J.

**Motion of Securities and Exchange Commission
for Leave to Intervene.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings for an Arrangement
No. 74023

[SAME TITLE]

The Securities and Exchange Commission, by Edmund Burke, Jr. and J. Anthony Panuch, its attorneys, moves for leave to intervene in this proceeding for the purpose of moving this Court

- (a) to dismiss the Debtor's petition herein;
- (b) to deny confirmation of the Debtor's Arrangement; and
- (c) to dismiss this proceeding, on the grounds stated in the motions submitted herewith.

The motion for intervention is based on the following grounds:

I.

On May 31, 1939, the above named Debtor filed a petition under Section 322 of the Bankruptcy Act of 1898, as amended, proposing an arrangement under Chapter XI of that Act. On May 31, 1939, this Court entered an order finding, among other things, that the aforesaid petition of the Debtor has been properly filed under said Section 322.

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

II.

Upon information and belief, the Debtor has outstanding the following securities in the hands of the public:

<i>Description</i>	<i>Amount</i>
Fifteen-Year Sinking Fund 6% Gold Debentures of G.A.F. Realty Corporation dated January 1, 1939 and due January 1, 1944 (Guaranteed by the Debtor as to principal, interest and sinking fund payments)	\$ 1,203,500.00
6% Sinking Fund Debentures of Debtor due January 1, 1944	1,135,500.00
Guarantee of the principal, interest and sinking fund payments on the First Mortgage Twenty-Year Five and One-Half Per Cent. Sinking Fund Gold Loan Certificates, dated June 1, 1919, and due June 1, 1939, of Trinity Buildings Corporation of New York	3,710,500.00
900,000 shares no par value stock (Stated value: \$20 per share)	18,000,000.00

The Debtor's capital stock is listed on the New York Stock Exchange, and is registered with the Securities and Exchange Commission as a listed security under the provisions of the Securities Exchange Act of 1934, as amended. A registration statement for 63,000 shares of the Debtor's capital stock has also been filed with the Securities and

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

Exchange Commission under the provisions of the Securities Act of 1933, as amended.

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III.

The Securities and Exchange Commission (hereafter referred to as the Commission) is an agency of the United States, created pursuant to Section 4(a) of the Securities Exchange Act of 1934, as amended. Under the provisions of the Bankruptcy Act of 1898, as amended, the Commission is charged with certain duties and vested with certain rights, powers and privileges for the purpose of enabling it to protect and represent investors and the general public in connection with the reorganization of corporations under Chapter X of that Act. Among these rights, powers, privileges and duties, are the following:

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A. Section 172 provides that any plan of reorganization which the Judge regards as worthy of consideration must, in any case in which the Debtor's scheduled indebtedness exceeds \$3,000,000, be submitted to the Commission for an advisory report, before the plan may be approved by the Judge as fair and equitable and feasible.

B. Section 175 requires that the report of the Commission, if any, filed in the proceeding, or a summary of the report prepared by the Commission, be transmitted to all creditors and stockholders who are affected by the plan.

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C. Section 203 provides that the Commission must, if requested by the Judge, and may, upon its own motion, if approved by the Judge, file a notice of its appearance in any proceeding. It further provides that, upon the filing of such

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

a notice of appearance, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in the proceeding, and shall be deemed to have intervened in respect of all matters in the proceeding with the same force and effect as if a petition for that purpose had been allowed by the Judge, with the exception that the Commission may not appeal or file any petition for appeal in the proceeding.

D. Section^o 265 provides that the Commission shall be given notice of all steps taken in connection with any proceeding, and that there shall be transmitted to the Commission copies of prescribed papers filed in the proceeding and of such other papers as the Commission may request or the Court may direct be transmitted to it.

IV.

Schedules attached to the petition filed by the Debtor state that the Debtor has assets of \$23,378,988.90, liabilities of \$5,538,985.05, and contingent liabilities in excess of \$3,900,000.00. Since the Debtor's scheduled indebtedness exceeds \$3,000,000.00, any plan of reorganization for the Debtor which the Judge deemed worthy of consideration would have to be submitted to the Commission for an advisory report, pursuant to Section 172, and pursuant to Section 175 a copy of the report, or a summary thereof prepared by the Commission, would have to be transmitted to all creditors and stockholders who are affected by the plan.

V.

The Commission represents that the petition of the Debtor has been improperly filed under Chapter XI of the Bank-

*Motion of Securities and Exchange Commission
for Leave to Intervene.*

ruptcy Act, as amended, on the grounds that Chapter XI is not available for a corporation which has publicly held securities, and that if such a corporation desires to adjust its obligations under the provisions of the Bankruptcy Act, as amended, it must file a petition under Chapter X thereof.

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VI.

The aforesaid issue raises an important question of jurisdiction and administration under the Bankruptcy Act. The determination of the issue in this proceeding affects the interests of investors who hold the Debtor's securities, and the interest of the Commission in the protection and exercise of the rights, powers, privileges and duties conferred upon it, as an agency of the United States, in the interests of the public. If the proposed arrangement is confirmed and the proceedings are not dismissed, the interests of investors in this proceeding will be improperly affected; the Commission will be denied the rights, powers and privileges conferred upon it by Chapter X; and it will be prevented from performing its duties under that chapter. In particular, there will not be referred to the Commission for the preparation of an advisory report such plans as the judge deems worthy of consideration.

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VII.

The Commission's interests, as aforesaid, and the interests of the investing public, are not represented by any party to this proceeding. The adequate representation of these interests requires that the Commission be permitted to intervene for the purpose of taking all such steps as may be appropriate for their protection in this proceeding, and for

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*Motion of Securities and Exchange Commission
for Leave to Intervene.*

412 the purpose of enabling it to appeal in the event that any adverse orders are entered in the District Court concerning these interests.

WHEREFORE, the Commission respectfully prays for the annexed order to show cause, for which no previous application has been made.

Dated, New York, N. Y., July 18, 1939.

EDMUND BURKE, JR.
Edmund Burke, Jr.

413 J. ANTHONY PANUCH
J. Anthony Panuch

Attorneys
for the

SECURITIES AND EXCHANGE COMMISSION

[Verification]

Answer of Debtor to Motion to Intervene.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

415

In the Matter
of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor.

In Proceedings for an
Arrangement
No. 74023

TO THE HONORABLE THE JUDGES OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK:

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The answer of United States Realty and Improvement Company, Debtor, to the motion of the Securities and Exchange Commission for leave to intervene, verified by J. Anthony Panuch, on July 18, 1939, as Special Counsel to the Securities and Exchange Commission respectfully states:

FIRST: The Securities and Exchange Commission is a body created by an Act of Congress and there is no Act of Congress authorizing the Securities and Exchange Commission in any manner or in any respect to participate in a proceeding under Chapter XI of the Bankruptcy Act. Therefore, the motion of the Securities and Exchange Commission for leave to intervene is ultra vires such Commission.

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SECOND: Chapter XI does not provide for participation of the Securities and Exchange Commission in any proceeding brought thereunder. Therefore, this Court has no jurisdiction to permit the Securities and Exchange Commission to intervene or otherwise participate in this proceeding.

Answer of Debtor to Motion to Intervene.

THIRD: The Securities and Exchange Commission is not a proper party to this proceeding and is not an interested party and therefore is not entitled to intervene.

FOURTH: The Debtor alleges that the allegations of the Securities and Exchange Commission regarding its rights in a Chapter X proceeding and specifically referring to Section 208, which denies such Commission the right of appeal, do not constitute any authority for such Commission to act in the premises or authority for such Commission to appeal from any orders of the Court herein, which as is frankly stated, is the purpose for the Commission's motion for leave to intervene.

FIFTH: The Debtor denies that its Petition has been improperly filed under Chapter XI and further denies that the provisions of Chapter X are available or applicable to it.

SIXTH: The Debtor denies that the Securities and Exchange Commission has any duties, privileges, rights or powers in this proceeding and has any jurisdiction in the premises.

SEVENTH: The Debtor alleges that no Plan of Reorganization is being submitted but that the Arrangement proposed herein merely contemplates the extension and modification of one class of unsecured debt of the Debtor.

EIGHTH: The Securities and Exchange Commission not being a proper party and not being authorized to act in the premises, and the Court having no jurisdiction to permit the intervention of such Commission, such Commission is not entitled to any right to appeal from any orders of the Court herein nor further to participate herein.

Answer of Debtor to Motion to Intervene.

WHEREFORE, the Debtor respectfully prays that the motion of the Securities and Exchange Commission for leave to intervene be in all respects denied.

421

UNITED STATES REALTY AND IMPROVEMENT
COMPANY

By (sgd.) A. J. Flohr
Vice-President

ATTEST:

(sgd.) F. M. Sanders,
Secretary

[VERIFICATION]

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423

Order Appealed from re Intervention of Securities and Exchange Commission, Dated July 28, 1939.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor

SECURITIES AND EXCHANGE
COMMISSION,

Applicant for
Intervention

In Proceedings for an
Arrangement
No. 74023

**ORDER FOR
INTERVENTION**

The Securities and Exchange Commission, having duly moved this Court for an order permitting it to intervene in this proceeding for the purpose of moving this Court to dismiss the Debtor's petition herein, to deny confirmation of the Debtor's proposed Arrangement, and to dismiss the proceeding, and for such other and further relief as to the Court may seem proper, and said motion having regularly come on to be heard before me on the 20th day of July, 1939, after due notice to the Debtor, the Guaranty Trust Company of New York, and the committees which heretofore intervened in this proceeding,

Now, on reading the motion verified the 18th day of July, 1939, the order to show cause dated the 18th day of July, 1939, the answer of the Debtor verified the 20th day of July, 1939, and upon all other papers and proceedings heretofore had herein, and after hearing J. Anthony Panuch, attorney for the Securities and Exchange Commission, in support of the motion, and White and Case (Joseph M. Hartfield, of Counsel), attorneys for the Debtor, and Ralph Montgomery Arkush, attorney for the Grimm Committee, herein, in opposition thereto, it is on motion of Edmund

*Order Appealed From re Intervention of Securities
and Exchange Commission.*

Burke, Jr., and J. Anthony Panuch, attorneys for the
Securities and Exchange Commission,

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ORDERED that the Securities and Exchange Commission
be and it hereby is permitted to intervene in this proceeding
for the purpose of moving this Court to dismiss the Debtor's
petition, to deny confirmation of the Debtor's proposed
Arrangement, and to dismiss the proceeding, for the purpose
of taking such other steps as may be appropriate to contest
the jurisdiction of the Court over this proceeding under
Chapter XI of the Bankruptcy Act, as amended, and for the
purpose of enabling the said Commission to appeal from any
order made in this proceeding with respect thereto; and
it is further

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ORDERED that notice of hearings upon any questions
relating to the foregoing matters as to which the Securities
and Exchange Commission is hereby permitted to intervene
shall be given to Edmund Burke, Jr., and J. Anthony
Panuch, its attorneys, at their offices, No. 120 Broadway,
New York City, New York.

Dated New York, N. Y., July 28th, 1939.

VINCENT L. LEIBELL,
U. S. D. J.

429

**Order to Show Cause re Motions to Dismiss,
Dated July 18, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of

**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**

Debtor.

**SECURITIES AND EXCHANGE
COMMISSION,**

Intervenor.

In Proceedings for an
Arrangement

No. 74023

**ORDER TO SHOW
CAUSE**

Upon the annexed motions of the Securities and Exchange Commission, it is

ORDERED that the debtor, Guaranty Trust Company of New York, and the committees who have heretofore intervened in this proceeding, show cause before me in Room 506, in the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 20th day of July, 1939, at 4:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why the order of this court, dated May 31, 1939, finding that the petition herein was properly filed under Section 322 of the Bankruptcy Act, as amended, should not be vacated, why the petition herein should not be dismissed, why confirmation of the proposed arrangement should not be denied, and why the proceedings herein should not be dismissed, and why such other and further relief as to the court may seem proper should not be granted.

AND IT IS FURTHER ORDERED that service of a copy of this order to show cause and of the papers upon which it is granted upon the attorneys for the above named persons on or before the 18th day of July, 1939, at 5:00 P. M., shall be sufficient.

Dated, New York, N. Y., July 18th, 1939.

Vincent L. Leibell,

**Motions to Vacate Order Approving Petition
and to Dismiss Petition, and to Deny Con-
firmation of Arrangement and to Dismiss
Proceedings.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Proceedings for an Arrangement

No. 74023

[SAME TITLE].

The Securities and Exchange Commission, by its attorneys Edmund Burke, Jr. and J. Anthony Panuch, moves to vacate the order dated May 31, 1939, finding that the Debtor's petition had been properly filed under Section 322 of the Bankruptcy Act, as amended, and to dismiss the petition on the grounds that the petition was not properly filed under Section 322 because the provisions of Chapter XI of the Bankruptcy Act do not apply to a debtor corporation which has securities outstanding in the hands of the public.

The Securities and Exchange Commission, by its attorneys, further moves that the Court deny confirmation of the proposed arrangement herein and dismiss the proceedings on the grounds:

(1) That the Court does not have jurisdiction over this proceeding because Chapter XI of the Bankruptcy Act, as amended, under which the petition was filed, does not apply to a debtor corporation which has securities outstanding in the hands of the public.

(2) That the proposed arrangement cannot properly be confirmed, and the proceedings may therefore be dismissed.

*Motions to Vacate Order Approving Petition and to Dismiss
Petition, and to Deny Confirmation of Arrangement
and to Dismiss Proceedings.*

436 pursuant to Section 376(2), because for the reasons set
forth in the preceding paragraph, (a) the provisions of
Chapter XI have not been complied with, as required by
Section 366(1); (b) the proposed arrangement is not for
the best interests of creditors of the debtor, as required by
Section 366(2); (c) the proposed arrangement is not fair
and equitable and feasible, as required by Section 366(3);
and (d) the arrangement has not been proposed in good faith,
as required by Section 366(5).

437 WHEREFORE, the Commission prays for the annexed
order to show cause, for which no previous application has
been made.

EDMUND BURKE, JR.

Edmund Burke, Jr.

J. ANTHONY PANUCH

J. Anthony Panuch

Attorneys

for the

SECURITIES AND EXCHANGE COMMISSION

438

Answer of Debtor to Motions to Dismiss.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

439

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor,

In Proceedings for an
Arrangement.
No. 74023

ANSWER TO MOTION OF SECURITIES AND EX-
CHANGE COMMISSION TO VACATE ORDER APPROV-
ING PETITION AND TO DISMISS PETITION AND TO
DENY CONFIRMATION OF ARRANGEMENT AND TO
DISMISS PROCEEDINGS.

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STATE OF NEW YORK

88.:

COUNTY OF NEW YORK

HENRY M. MARX, being duly sworn, déposes and says,
that he is an attorney duly admitted to practice before this
Court and that he is associated with Messrs. White & Case,
14 Wall Street, New York, N. Y., attorneys for United States
Realty and Improvement Company, the Debtor herein. That
the motion of the Securities and Exchange Commission to va-
cate the order approving the petition herein and to dismiss the
petition and to deny confirmation of Arrangement and to
dismiss the proceeding is premature inasmuch as the
Securities and Exchange Commission is not a party to this
proceeding.

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Answer of Debtor to Motions to Dismiss.

The Securities and Exchange Commission has no standing and is not a proper party to this proceeding for the reasons set forth in the answer of the Debtor to the motion of the Securities and Exchange Commission for leave to intervene. Deponent believes that the provisions of Chapter XI have been complied with; that the Arrangement is for the best interest of creditors; that it is fair and equitable and feasible; that the Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt and the proposal of the Arrangement and its acceptance are in good faith and have not been made or procured by any means or promises or acts forbidden by the Bankruptcy Act (all as set forth in Section 366 of the Bankruptcy Act).

WHEREFORE, Deponent respectfully prays that the aforesaid motion of the Securities and Exchange Commission which has not been verified as required by the rules of this Court be in all respects denied.

HENRY M. MARX.

Sworn to before me this
20th day of July, 1939.

ROBERT B. HEINKEL.

ROBERT B. HEINKEL

Notary Public, New York County

N. Y. Co. Clk's No. 386 Reg. No. OH583

Cert. filed in Kings Co. No. 240 Reg. No. 440

Cert. filed in Bronx Co. No. 60, Reg. No. 171H40

Commission Expires March 30, 1940

(Notarial Seal.)

**Order Appealed from re Motions to Dismiss,
Dated July 28, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor,
SECURITIES AND EXCHANGE
COMMISSION,
Intervenor.

In Proceedings for an
Arrangement.
No. 74023.

**ORDER DENYING
MOTIONS**

The Securities and Exchange Commission, having duly moved this Court for orders vacating the order of this Court dated May 31, 1939, which found that the Debtor's petition had been properly filed under Section 322 of the Bankruptcy Act, as amended, dismissing the Debtor's petition herein, denying confirmation of the Debtor's proposed Arrangement, and dismissing the proceeding, and said motions having regularly come on to be heard before me on the 20th day of July, 1939, after due notice to the Debtor, the Guaranty Trust Company of New York, and the committees which have heretofore intervened in the proceeding,

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Now, on reading the said motions, the order to show cause dated the 18th day of July, 1939, the answer of the Debtor sworn to the 20th day of July, 1939, and the Debtor having in open court withdrawn and waived the objection that the aforesaid motions have not been verified, and upon all the other papers and proceedings heretofore had herein, and after hearing J. Anthony Panuch, attorney for the Securities and Exchange Commission, in support of the motion, and

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*Order Appealed from re Motions to Dismiss.
Dated July 28, 1939.*

448 White and Case (Joseph M. Hartfield, of Counsel), attorneys
for the Debtor, and Ralph Montgomery Arkush, attorney
for the Grimm Committee herein, in opposition thereto, it
is . . .

ORDERED that the said motions of the Securities and
Exchange Commission be and the same hereby are in all
respects denied.

Dated New York, N. Y., July 28th, 1939.

VINCENT L. LEIBELL
U. S. D. J.

Order Appealed from re Reference of Proceeding to Referee, Dated July 28, 1939.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

451

In the Matter of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,

Debtor

In Proceedings for an
Arrangement.
No. 74023

**ORDER REFERRING
PROCEEDING TO A
REFEREE.**

UPON all the proceedings heretofore had herein, and pursuant to the directions stated on the record of the hearing on July 27, 1939, it is

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ORDERED, ADJUDGED AND DECREED that the above-entitled proceeding be and it hereby is referred to

HON. JOHN E. JOYCE

one of the Referees in Bankruptcy of this Court, to take such action and such proceedings therein as are required and permitted by the Bankruptcy Act.

Dated, July 28th, 1939.

**VINCENT L. LEIBELL
U. S. D. J.**

453

**Meeting of Creditors before Judge Leibell—
June 28, 1939**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Bankruptcy No. 74,023

Before :

HON. VINCENT L. LEIBELL,

District Judge.

New York, June 28, 1939,

3 P. M.

APPEARANCES:

WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph M. Hartfield, Esq.,

Joseph A. Bennett, Esq., and

Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.

Attorneys for Ralph W. Earl and

Donald M. Halsted, as member

of Bondholders Protective Committee.

SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee

of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and

H. McAfee, Esq., of Counsel.

Meeting of Creditors before Judge Leibell—June 28, 1939

DAVIS, POLK, WARDWELL, GARDINER & REED,
Esqrs.,

Attorneys for Guaranty Trust
Company of New York, as Mortgagee;

J. Howland Auchincloss, Esq., and
Carroll H. Brewster, Esq., of Counsel.

457

I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a
creditor.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage certificate-
holders;

Charles Foster Brown, Esq., of Counsel.

458

GOODALE, HANSON & HOOKER, Esqrs.,

Attorneys for A. B. W. DeWitt
and Marguerite E. DeWitt, certifi-
cateholders;

George J. Osburg, Esq., of Counsel.

JAMES L. BARGER, Esq.,

Attorney, appearing for himself.

LORENZO D. ARMSTRONG, Esq.,

Attorney for Greenwich Trust
Company of Greenwich, Conn.

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JAMES R. COUPER,

A certificateholder, in person.

CLAUDIUS M. MEEKS,

A certificateholder, in person.

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WATSON, KRISTELLER & SWIFT, Esqrs.,

Attorneys for R. Gilbert Jackson;

Frederic W. Dillingham, Esq., of Counsel.

The Court: This is a meeting of creditors called pursuant to an order signed in this proceeding on May 31st. It was directed in paragraph 7 of that order that this meeting be held for the purpose of receiving and hearing proofs of claim, and that the same be received, allowed or disallowed. Since the signing of this order there was submitted to me a further order in reference to the filing of proofs of claim, and also in reference to the filing of an application for a confirmation of the arrangement.

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Mr. Marx: * * * I would like to make this short statement: As of June 1, 1919, the Trinity Buildings Corporation of New York executed and delivered to Guaranty Trust Company of New York, as mortgagee, its bond and first mortgage in the principal amount of seven million dollars to secure its first mortgage twenty year 5½ per cent sinking fund gold loan which became due on June 1, 1939. Such first mortgage covers the premises known as 111-115 Broadway, with respect to which testimony will be offered shortly. Guaranty Trust Company of New York, as such mortgagee, in turn issued and sold participation certificates in said loan to United States Realty & Improvement Company, which was and is the holder of all of the outstanding capital stock of Trinity Buildings Corporation of New York. United States Realty & Improvement Company in turn executed

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and delivered to Guaranty Trust Company of New York, as such mortgagee, a guarantee of the aforesaid loan and the share certificates therein, and sold the certificates to the National City Company which effected a public distribution thereof. Such guarantee is the sole obligation affected by the arrangement. There was filed with the petition for an arrangement on May 31, 1939, a copy of the bond and mortgage and of the guarantee.

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Through the operation of a sinking fund the principal amount of the outstanding share certificates has been reduced to \$3,710,500. All the interest has been paid on such certificates to December 1, 1938, for nineteen and one-half years, but the instalment due on June 1, 1939 has not been paid. Real estate taxes to date have been met.

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The Mortgage Moratorium Law of the State of New York, as your Honor knows, prevents any foreclosure or action for principal on the bond or on the guarantee, even though the principal has matured, so long as interest on the mortgage and taxes on the premises are paid.

In the event of a default in interest or taxes, which permits foreclosure or an action for principal, the fair market value of the premises (believed to be in excess of the amount of the mortgage) can be established as a setoff, thereby preventing any deficiency judgment against either the mortgagor or the guarantor. Therefore, if such action for principal were instituted and such offset were established, United States Realty & Improvement Company, the debtor, would be released from further liability on its guarantee. The mortgage moratorium and deficiency judgment laws now in effect have been extended for at least another year.

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Therefore, as a matter of law, holders of share certificates, as the real parties in interest and actually as mortgagees,

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would have the option, under the interest default which exists at present, of foreclosing and releasing the debtor on its guarantee, or else agreeing to some extension or modification of the guarantee (which has been done by the holders of in excess of fifty per cent of the share certificates). There is a further option of bringing actions periodically for interest and, if paid by the certificate holders of the mortgage, for taxes. But that will be no solution to the problem, as will appear.

It is believed that foreclosure might destroy the equity of the debtor, if any, in the premises, and that the extension and modification of the guarantee contained in the arrangement is a fair one to all parties concerned.

It is true, of course, that the debtor probably would be able to meet taxes and interest at the present rate on the Trinity mortgage for the next year or so, but such payment would not be a solution to the problem since the mortgage moratorium and deficiency judgment laws of the State of New York are of a temporary nature, and such payments would make considerable inroads on the debtor's working capital and might conceivably lead to a forced liquidation either in bankruptcy or in some other insolvency proceeding and to substantial losses to its creditors and stockholders. In addition, unless the situation is solved at the present time, the uncertainty with respect to the ultimate disposition of the Trinity first mortgage loan will continue to be detrimental not only to holders of share certificates and creditors of the debtor, but also to the debtor itself.

The arrangement has been proposed by the debtor as a bona fide offer of a fair solution to the problem. It is to be noted that holders of share certificates have received full interest for nineteen and one-half years, and that the

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principal of the obligation under the loan has been reduced almost fifty per cent by the operation of a sinking fund. It is hoped that, with the modifications and extension proposed, any recovery in real estate in the financial district will lead to a further rapid reduction in the principal amount of the loan and possibly to a refunding thereof. The debtor attempted, some time prior to promulgation of the arrangement, to secure a new loan in order to pay holders of share certificates, but by reason of the reduced earning capacity of the buildings was unable to do so.

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The arrangement may be briefly summarized as follows:

1. There is no change in the physical security or the principal amount;

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2. The maturity is extended for ten years and one month, the one month being to make the interest dates coincide with the fiscal year of the company;

3. The interest rate is to be changed from $5\frac{1}{2}\%$ per annum to 3% per annum fixed, plus 1% for the first five years and 2% for the next five years contingent on income, but, in any event, payable at maturity;

4. The amended modification plan and arrangement contemplates that the primary obligation of Trinity Buildings Corporation of New York, as mortgagor, be similarly modified in a proceeding under the New York State Burchill Act as soon as the arrangement herein is confirmed;

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5. In the event that the plan is confirmed under the Burchill Act, all available net earnings in each year after payment of fixed interest, up to and not in excess of \$50,000,

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are to be deposited in a so-called improvement fund prior to the payment of contingent interest. Such fund is to be used for capital improvements to the premises and may be used with the consent of the corporate trustee for other purposes as set forth in the arrangement;

6. All excess earnings until the principal amount of the mortgage is reduced to \$2,500,000 are to be used for a sinking fund and no dividends are to be paid by the mortgagor until the principal amount of the mortgage shall have been so reduced. After such reduction no dividends shall be paid in any year in excess of amounts set aside in such year for sinking fund purposes and, in any event, dividends shall not exceed \$50,000 in any year so long as the mortgage remains outstanding in any amount.

Incidentally, all excess earnings, as I used the phrase, means after leaving the working capital for Trinity Buildings Corporation of New York of \$50,000.

7. Provision is contained for limiting salaries of officers and directors of Trinity Buildings Corporation of New York or its successor;

8. Both the modified guarantee and the indenture providing for the new bonds under the Burchill Act proceeding are to contain provisions for amendment by consent of holders of two-thirds of such bonds or share certificates, as the case may be, provided that there is no active dissent from any proposed amendment by holders of 20% in principal amount;

9. It is important to realize that no other obligations of the debtor or of Trinity Buildings Corporation are to be

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affected by the arrangement, but that an indebtedness owing by Trinity Buildings Corporation of New York to the debtor in excess of ten million dollars will to all practical purposes be eliminated since it will not be assumed by the new company which will take over the mortgaged premises upon consummation of the Burchill Act foreclosure.

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I now call Mr. Flohr, vice president and treasurer of the debtor, to the stand to testify and to be subject to cross examination.

The Court: Before you do that, I will hear any statement in opposition.

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Mr. Rickaby: If your Honor please, our opposition to the plan is not going to depend very much on this testimony. The statute requires that before a plan or before an arrangement can be confirmed it must be found equitable. In that respect, Chapter XI of this Act is analogous to Chapter X, and it has been repeatedly decided in this circuit that any attempt, in brief language, to chisel creditors and leave the debtor alone, is unfair. I refer, your Honor, to the Day & Meyer case, which is in 93 Fed. (2d) 657, and to the Barclay Park case which preceded it, 90 Fed. (2d) 595. This petition in this proceeding sets forth various obligations of this particular debtor which are secured, and also about \$6000 or \$7000 of other unsecured claims. The holders of these certificates, so far as their relation to this debtor is concerned, are unsecured creditors. They are secured creditors of the debtor's subsidiary, the Trinity Buildings Corporation. Counsel for this debtor referred to the fact that while the principal might not be sued for, the holders of these claims

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would have the option to come in and sue for the interest from time to time as it becomes due. That would also apply to the taxes if they were not paid, and that that might go along for a couple of years. They say in their petition: "No other creditors or class of creditors are affected by the arrangement because the debtor proposes to and is able to pay all of its debts, secured and unsecured, as they mature. All other funded debt of the debtor is secured, and the only unsecured debt besides the aforesaid guarantee is set forth in the schedules annexed."

That amounts to about six or seven thousand dollars. That is the very baldest attempt to chisel these security holders here, these certificate holders.

With reference to the Burchill Act, they know they could not have that relief in the Federal Court, and I do not believe they can get it in the State Court. Col. Hartfield would not attempt to come in here for a minute under Chapter X and try to get away with what they are trying to get away with as a secondary step in the State Court through the medium of the Burchill Act, and I don't believe that they can get away with it there even if they should ever attempt it.

Now, if your Honor please, the purpose of this is to leave the debtor alone, reduce its obligation, leaving its subsidiary enjoying the prospects of the future, if there are any prospects, and chisel the certificate holders. That just cannot be done. I am willing to rest that right on the two decisions which I have cited to your Honor. Those decisions were under Section 77B, which as far as that is concerned, is the same as Chapter X of this Act, and what is fair in one street is fair in the next block, and it cannot be otherwise. What is unfair in one of these routes is unfair in the other one.

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In this particular property I call your Honor's attention to the fact that the debtor contributes nothing. They do not put in any new money. They do not add anything. They do not agree to do anything. They want to keep this for themselves, and there is nothing unique about it. Let us suppose this was some particular industry where the stockholders of the debtor had particular skill, that they could furnish something that nobody else could, and agreed to furnish that skill for a substantial period of time in the future. That situation does not exist here. These are a couple of office buildings, as your Honor very well knows, and there are fifty people in New York who can manage those buildings just as well as the officers of this debtor and its subsidiaries. I say to your Honor that under those decisions, under the Day & Meyer case and the Barclay Park case—this court cannot confirm this arrangement. I do not need any brief on the subject. Those cases that I cited to your Honor are directly in point, and we are willing to stand on them.

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The Court: * * * Now, Colonel, tell me about this. You know this Day & Meyer case and you are familiar with it.

Mr. Hartfield: Yes and with the Barclay case, but of course they are cases where the party seeking the reorganization of the property was the owner of the title, of the leasehold, and they had obligations outstanding. It was proposed in the reorganization to give the capital stock something, but full provision was not made for the bonds. You see, in this case that question and the question of whether or not the plan is a fair one, or whether or not there is any equity will come up in the Burchill proceeding, where the

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Trinity Buildings, the owner of the fee, is the party seeking the reorganization in the ordinary 77B case, but here in this case we are dealing with a wholly independent thing, with the guarantee, where the guarantee under the moratorium law is not enforceable at all if they sought to enforce their right to go ahead and take the property from the principal debtor, because if there was proof that the mortgage value of this property was not less than the amount of bonds outstanding, they could get no deficiency judgment and there would be nothing due on the guarantee.

The Court: Suppose they sued for the interest regularly?

Mr. Hartfield: They could sue for the interest but you could see that would be a temporary thing.

The Court: Couldn't they hold you on the guarantee?

Mr. Hartfield: They could hold us on the guarantee, on the instalment of the interest due, but that is no solution of the problem, because it would come up every six months and no one knows how long this moratorium is going to be in effect. What I want to impress upon your Honor is that you take a large number of these bonds and certificates; they are held by insurance companies and banks who do not want the property, who do not want the title to the property; it has been suggested to you that we could divest ourselves of the stock because they cannot hold a bond; they want to hold real estate. What they want is to have the property adequately managed and to have the claim for the interest that is forgiven added to the claim so that at the end it is cumulative and nothing can be received by the equity holders until these instalments of deferred interest are made up. In other words, this is an arrangement which we are proposing to enter into at the request

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of a large number of the holders of these certificates who do not want to have this property foreclosed. The situation here is altogether different from the case if there was a reorganization attempted, and the argument that is made as to the Day & Meyer case would be and can be presented in the Burchill proceedings. It can then be determined whether or not the court will adopt that rule, but, you see, we are offering the certificate holders something they have not got. If they did go ahead and take the property under the Burchill—

The Court: What is it that they haven't now?

Mr. Hartfield: We are making an absolute agreement to which the State moratorium law has no application because even if the other reorganization is not made effective, even if the courts hold that we cannot put this extension into effect with the consent of the large number, both in amount and number of bondholders—we are making here an independent agreement that, irrespective of whether or not there is any liability under the New York State Moratorium Act, and irrespective of whether the Burchill reorganization becomes effective, we guarantee and our guarantee remains in effect free from defect and free from any defenses. We have no moratorium law, not only for this fixed rate of three per cent but there is added to it at the end of it this provision for cumulative interest. Now, for anybody to say that is not giving up something, it is just distorting language because there is a real abandonment of defenses. Now of course it may be true that there are fifty people who can run these two buildings as well as our company, but the great majority of the certificate holders do not think that is the fact. They think that the years of experience that this company has had in the management of these two properties

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—and were universally successful up until 1934—are sufficient, and anybody that does not recognize what has happened to real estate values in lower New York, in the financial district, in the last few years, just has not got the sight of a nine-day old puppy, because, as everyone knows, that knows anything about the situation, the conditions are altogether changed, and that despite the fact that these companies were well and successfully managed so that interest was paid in full for 19½ years, the income has materially shrunk, and it is not unique to these buildings.

Now, I liked your Honor's suggestion that you have Mr. Flohr, the treasurer of this company, take the stand and detail the origin of these buildings, the income of them over the periods, and the present incomes, and will show the reasons why we are proposing at the instance of a large number of certificate holders this arrangement, and I believe that when you have heard it even Mr. Rickaby, and all of the others, will say it is a much better arrangement than any suggestion that the certificate holders stand strictly upon their rights and take the property and run the risk of bringing a suit every six months upon instalments of guaranteed interest, that they do not collect from the property, and I believe the minute they foreclose and take over the property—and if we are right about the value of it under the moratorium law—they could not even collect the interest instalments from us because there would be no basis for any deficiency there at all.

The Court: Tell me, the plan contemplates that your guarantee will continue, but in a modified form.

Mr. Hartfield: Right.

The Court: Deferring until the end of the ten-year period of extension the payment of any interest. That is deferred

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under the certificates until that time, is that right, whether that interest amounts to $1\frac{1}{2}$ per cent or $2\frac{1}{2}$ per cent?

Mr. Hartfield: It is one per cent for the first five years and two per cent for the next five years, and that is cumulative and is added to the principal so that if it is not earned it is not paid. The property will eventually have to reduce that before anything can possibly be obtained for anybody else.

The Court: What I want to know is this: is the interest definitely reduced to three per cent?

Mr. Marx: Fixed.

The Court: Plus one per cent.

Mr. Hartfield: Plus one per cent for five years and then plus two per cent for the next five years, if earned, and that contingent income interest is made cumulative and is added to the balance, you know, the principal of the guarantee at the due date.

The Court: And that is what you guarantee?

Mr. Hartfield: Yes, sir. The principal is \$3,710,000 plus, in effect, 4 per cent interest for five years, and five per cent interest for the balance.

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Mr. Rickaby: May I say this to your Honor, just in answer to what Col. Hartfield said that I used those same arguments that he made in the Barclay case, but the Circuit Court of Appeals would not let me get away with it, and there were \$19,000—

The Court: Yes, that is where they tried to give something to stockholders.

Mr. Rickaby: That was a hotel. They kept their stock.

The Court: When they were reducing the interest.

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Mr. Hartfield: Not only reducing the interest but a large part of the principal.

The Court: And also the principal.

Mr. Hartfield: And here there is no reduction in principal at all.

Mr. Rickaby: They were not doing that there.

The Court: There is another point in this case, Col. Hartfield, that is probably different, and that is this: here we have a debtor, the United States Realty & Improvement Company. Are you satisfied that under this statute you can make an adjustment, or an arrangement of a single obligation of the debtor?

Mr. Marx: The statute provides specifically, your Honor, that the Court may fix the division of creditors into classes.

The Court: I know, but it must be a division. It is not just an arbitrary division.

Mr. Bardusch: If I may show your Honor—

The Court: I have it here.

Mr. Marx: This is the sole unsecured debt of the company. It is section 351.

The Court: Oh, yes.

Mr. Hartfield: Yes, your Honor.

Mr. Marx: And then there are further provisions in the Act, your Honor, about creditors who are affected by the arrangement and who are not affected by the arrangement. Those not affected by the arrangement, their consent not being necessary to the confirmation.

The Court: Well, I think you have given me the answer. This is the sole unsecured obligation of the debtor.

Mr. Hartfield: That is right.

Mr. Marx: That is of the funded debt, your Honor.

Mr. Rickaby: Except the \$6,000, and may I say this to

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your Honor, that Col. Hartfield remarked about the banks and insurance companies liking this plan and wanting to do that, and that there were a great majority of them. If the plan is unfair it does not make any difference if ninety per cent of the creditors like it. It has got to stand the test of fairness, and the ninety per cent cannot give away property of the ten per cent.

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The Court: We will give due consideration to it.

Mr. Bardusch: If your Honor please, right in the plan and the financial statements annexed to the plan which they have supplied to us, it appears there that in the year 1936 the debtor—not the debtor but Trinity Buildings Corporation—earned over four per cent; in the year 1937 it earned 47½%, and in the year 1938 which is down to date practically, earned over 4 per cent, and yet they are proposing a guarantee of three. As I understand from—

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The Court: No, three plus if earned.

Mr. Bardusch: Oh, yes, but that one per cent is in the future and cannot be presumed to be better than the guarantee we have today. Realty does not put up a nickel for ten long years.

Mr. Marx: We will show that later.

The Court: Counsel, I would rather have the cash money than all the guarantees that you could hand me. Now it is the same way here.

Mr. Bardusch: Precisely.

The Court: Three per cent plus one, if earned.

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Mr. Bardusch: Yes.

The Court: You get the one per cent if earned. Who cares about a guarantee if you get it? If it is earned that is what you are interested in. If I had any of the certificates I would be more concerned about whether they earned it.

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I do not care about the guarantee.

Mr. Bardusch: But aren't you interested about the conditions, whether they can meet this guarantee of interest, not merely the earnings of Trinity?

Mr. Marx: Your Honor, we are prepared to call Mr. Flohr to the stand.

Mr. Rickaby: Mr. Flohr won't know all that. All that it is preventing a suit for the interest. We have requested the trustee to sue for the interest, and then the injunction in this proceeding came along and precluded that suit. That is the only reason the suit is pending for the interest.

The Court: Well, that is the reason I have these proceedings.

Mr. Hartfield: I think, if your Honor please, we would like to call Mr. Flohr to put in the income and earnings for five years and an estimate of what we are going to get the next two years, and then give those figures to any of these committees that are here, so that when we resume, the examination may be shortened and they will have that information, and it would take a very short time to do that.

The Court: All right, call him.

ARTHUR J. FLOHR, called as a witness on behalf of the debtor, being duly sworn, testified as follows:

Direct Examination by Mr. Hartfield:

Q. Mr. Flohr, what is your business? A. I am vice-president and treasurer of the United States Realty & Improvement Company.

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Q. And how long have you been connected with that company? A. Oh, over thirty years.

Q. And as treasurer of the company do you have custody of the books and records of the company, and particularly the financial records of the company? A. Yes, sir.

Q. How long have you been connected with the treasurer's office? A. Oh, twenty years or so.

Q. You are familiar with the property of the Trinity Buildings Corporation in New York? A. Yes, sir.

Q. Describe briefly the properties owned by that company.

A. Why, they are two office buildings at 111 and 115 Broadway, fireproof, steel and limestone buildings; 21 stories, with rentable areas: The Trinity Building of approximately 270,000 square feet, and the U. S. Realty Building of approximately 248,000 square feet.

Q. Were the buildings built at the same time? A. No. Part of the Trinity Building was built in 1905, as an addition to the Trinity Building, and the United States Realty Building was built in 1907.

Q. The Trinity Building is the one at 111 Broadway? A. 111 Broadway.

Q. And the United States Realty Building is 115 Broadway? A. Yes, sir.

Q. When were these two buildings conveyed to the Trinity Buildings Corporation of New York? A. In June, 1919.

Q. In June, 1919, did the Trinity Buildings Corporation deliver to the Guaranty Trust Company a first mortgage on these two buildings? A. Yes, sir.

Q. And what was the principal amount of the bonds outstanding in June, 1919? A. \$7,000,000.

Q. And what is the amount of those bonds now outstanding? A. \$3,710,500.

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Q. And in what manner has the mortgage been reduced from \$7,000,000 to \$3,710,000? A. By payments into a sinking fund of which the Guaranty Trust Company was the trustee, and through that sinking fund purchases of the bonds.

Q. Do you recall the execution of the share certificates in 1919? A. Yes, sir.

Q. What was that transaction? A. The mortgage was given to the Guaranty Trust Company for \$7,000,000 who in turn issued share certificates in such mortgage. These share certificates were sold to the United States Realty & Improvement Company, who in turn sold them to the National City Company and at the same time gave to the Guaranty Trust Company a guarantee of the provisions of the mortgage and the certificates.

Q. Were these certificates with this guarantee of the United States Realty & Improvement Company, the debtor, sold by the National City Company to the public? A. I believe they were.

Q. Does the Trinity Buildings Corporation owe the debtor, the United States Realty & Improvement Company any unsecured indebtedness at this time? A. Yes, sir.

Q. What is the amount of that indebtedness? A. The amount is \$10,442,482.99.

Q. As of what? A. As of May 31, 1939; \$8,781,192.44 in the form of a note that was part of the consideration at the time of the conveyance of the property to the Trinity Buildings Corporation, and \$1,661,290.55 on open account, accumulated since then.

Q. Have the real estate taxes on these properties, 111-115, been paid? A. Yes, sir, they have been paid to date.

Q. Up to what date was interest paid on these \$3,710,500

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of outstanding share certificates? A. Up to December 1, 1938.

Q. Has the principal which on the face of the bonds was due on June 1, 1939, or the interest which was due on that date, been paid? A. No, sir.

Q. Are you familiar with the operation of these buildings during the period from 1919 down to date? A. Yes, sir.

Q. Take the period up to the close of the year 1934. Was the income from the building sufficient to pay the interest and sinking fund requirements? A. Yes, sir.

Q. And was there also a substantial sum left for the equity? A. Yes, sir.

Q. What is the total of the semi-annual interest payments that have been made up to December 1, 1938, on this mortgage? A. The total payments of semi-annual interest and quarterly payments—quarterly sinking fund payments—

Mr. Rickaby: How is that material, the aggregate of interest? What has that got to do with it?

Mr. Hartfield: Well, we want to show what was done with the money.

Mr. Rickaby: I do not see the materiality.

Mr. Hartfield: It won't be long.

The Court: Go ahead.

A. \$8,777,830.68.

Q. How is that divided as between interest and sinking fund payments? A. Well, there was paid by the trustee on interest payments aggregating \$5,501,402.42, and there were share certificates purchased and retired in the amount of \$3,289,500.

Q. During this period was any interest paid on the in-

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debtedness due from the Trinity Buildings Corporation to the debtor, the United States Improvement & Realty Company? A. Yes, sir.

Q. How much was the total of those payments made on account of interest by the debtor to the United States Realty & Improvement Company?

The Court: By the Trinity.

Mr. Hartfield: By the Trinity Buildings Corporation to the debtor.

A. The total amount was somewhat in excess of \$11,000,000.

Q. How much of that was on account of interest? A. It was all on account of interest.

Q. Now, commencing with the year 1931 what was the situation with respect to the rental income from the buildings? A. Why, it began to fall.

The Court: What year was that?

The Witness: 1931.

Q. What was the percentage of occupancy up to 1931 in the Trinity Building? A. Well, I can't answer up to 1931, but in 1930 the Trinity Building was occupied 95.75 per cent.

Q. What was the average rent you were getting then per square foot? A. The average rate per square foot was \$4.80.

Q. And what was the situation of the United States Realty Building in that year? A. In 1930 the United States Realty Building was occupied 96.93 per cent.

Q. What was the average rate? A. At an average of \$4.32 per square foot.

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Q. Now take May 1, 1939: What is the occupancy of the two buildings, both in percentage and realization per square foot? A. The Trinity Building was 68.32 per cent occupied at an average rate of \$2.31 per square foot, and the Realty Building was 79.33 per cent occupied, at an average rate of \$2.01 per square foot.

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Q. What was the total rent roll of the Trinity Building on May 1, 1939? A. \$428,206.

Q. And what was it on the United States Realty Building? A. \$396,079.80.

Q. What does that make the total rent roll of both buildings? A. \$824,285.80.

Q. Now, in this rent roll is any part of it covered by leases which are about to expire and which can not be, in your opinion, renewed at the present rates specified in the leases? A. Well, of the rent roll approximately \$32,000 is covered by leases which you might say are on a more or less temporary basis that might be—and we expect to be—cancelled almost any time. Of these, of this \$32,000, we have already received cancellations effective between the 1st of May and the end of July approximately aggregating \$18,000. There is also a lease or leases to one tenant which expire on May 1, 1940, at an annual rental of \$68,000. That is an average rate greatly in excess of the present market rates. This lease will undoubtedly have to be renewed in 1940, if it is renewed, at a greatly reduced rate and possibly we may have to make some concession for the balance of this period in order to make such renewal.

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Q. Have you prepared a schedule showing the gross income of Trinity Buildings Corporation of New York, the amount of real estate taxes, the interest on the mortgage, the operating and maintenance expenses, the depreciation and

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the result of the operations for the last five years? A. Yes, sir, except that I haven't it with depreciation.

Q. But you have it with all the other items except depreciation? A. All the other items.

Mr. Hartfield: I will ask to have this schedule marked in evidence, and I will give a copy of it to any of the gentlemen present who asks for it.

Mr. Rickaby: Does it cover each year separately?

Mr. Hartfield: Yes; 1934 down to and including 1938 separately.

(Marked Debtor's Exhibit 1.)

Q. Now going back again: Looking at this statement of real estate taxes, what were the premises assessed at by the City of New York for the year 1938? A. They were assessed at \$11,225,000 for 1938.

Q. And how much taxes did you pay? A. Taxes were \$328,892.50.

Q. And what were the premises assessed at for the year beginning July 1, 1939? A. They were originally assessed at \$11,175,000.

Q. Did you make an application for a reduction of the assessment? A. Yes, sir.

Q. And did you obtain any reduction? A. Yes, sir. We got a reduction to \$10,500,000.

Q. And what will be the taxes payable for the year beginning July 1, 1939? A. \$309,750.

Q. Commencing with the years 1936, 1937 and 1938, was the total gross income equal to the real estate taxes, interest on the first mortgage and the operating expenses, leaving out depreciation? A. They were not.

Meeting of Creditors before Judge Leibell—June 28, 1939
Arthur J. Flohr—for Debtor—Direct.

Q. How much were they short for the year 1936? A. \$51,757.07.

Q. And how much for the year 1937? A. \$20,782.93.

Q. And how much for the year 1938? A. \$51,546.88.

Q. Now, if you add to that a depreciation in amount allowed by the government, the usual charge, would that increase the amount of these losses? A. Yes, sir.

Q. Now take the period for the six months ending May 1, 1939. How much has been earned toward the payment of interest? A. \$37,914.83.

Q. And what was the interest that was due for that six months? A. Around \$102,000.

Q. In round figures it was about \$102,000? A. Yes, \$102,000.

Q. Take the six months' period; have you prepared a statement showing the gross income, the real estate taxes and the other operating and maintenance expenses, and showing the balance available for this amount of interest due of \$102,000 approximately? A. Yes, sir.

Mr. Hartfield: I will ask to have this statement marked as debtor's exhibit 2, and I will furnish a copy to the gentlemen who wish it,—that is, the six months' statement.

(Marked Debtor's Exhibit 2.)

Q. Now, during the summer of 1937, and in November, 1938, did the Trinity Buildings Corporation and the United States Realty & Improvement Company attempt to secure a mortgage to provide funds to equal these outstanding certificates of \$3,710,000? A. Yes, sir.

Meeting of Creditors before Judge Leibell—June 28, 1939

Arthur J. Flohr—for Debtor—Direct.

Q. Were those efforts successful or not? A. No, sir, they were not.

Q. Without going into all the details, do you know one institution to which an application was made? A. The East River Savings Bank. We made an application for a loan of \$3,800,000.

Q. Did you supply them with figures showing the earnings for the prior years and for the current year and other information? A. Yes, sir.

Q. Relating to expiration of leases, the names of tenants and the physical condition of the properties? A. Yes, sir. We supplied them with all of that information.

Q. Have you applied to the R. F. C. for a loan? A. Counsel applied to the R. F. C. in 1938 for a loan, without success.

Q. And none of your efforts to obtain a mortgage loan, to refund these \$3,710,000 of outstanding certificates have been successful? A. No, sir.

Q. Now, have you prepared an estimate of the earnings of the Trinity Buildings Corporation of New York available for interest for the thirteen months ending December 31, 1939, and for the calendar years 1940 and 1941? A. Yes, sir.

Q. What was the basis upon which you prepared those earnings? A. I estimated the earnings of the Trinity Buildings Corporation available for interest, basing it upon the actual earnings for the six months ended May 31, 1939, and an estimate for the seven months ending December 31, 1939.

Q. In preparing this estimate for the seven months did you base it on the present rent roll? A. Yes, sir, I based it on the present rent roll and on the basis of an adjustment for rent to a tenant whose lease expires on April 30, 1940, and about whom I spoke a few minutes ago.

Meeting of Creditors before Judge Leibell—June 28, 1939
Arthur J. Flohr—for Debtor—Direct.

Q. Did you make any allowance for the expenses in this proceeding? A. No, sir.

Q. This lease that you referred to, did you tell us that in your opinion it was in excess of the present market value of this space? A. Yes, sir.

Q. How did you estimate the operating and maintenance expenses? A. The operating and maintenance expenses for the six months gone by are of course the actual, and those for the other seven months for the 13 months' period are based on the expenses for a similar period of a previous year.

Q. What did you do about taxes? A. I based taxes on the assessed valuation, the present assessed valuation, and the present tax rate.

Q. What did you do about the interest requirement under the amended plan which is being offered here? A. Well, the estimate that I prepared is designed to show how much will be earned on account of the interest under the amended plan.

Q. What will be the fixed interest, the three per cent fixed interest requirement under the amended plan for this period of 13 months? A. \$120,591.25.

Q. That is for each year? A. No, that is for the thirteen months.

Q. For the 13 months? A. For the two subsequent years. It would be \$111,315 in each year.

Q. And how much did you estimate would be available for the years ending December 31, 1940 and December 31, 1941 towards paying the fixed interest of approximately \$111,000 a year?

Mr. Rickaby: That is objected to as being no proof of the fact. It is purely a guess.

Mr. Hartfield: Well, he just stated how he arrived at the estimate.

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*Meeting of Creditors before Judge Leibell—June 28, 1939
Arthur J. Flohr—for Debtor—Direct.*

The Court: It is the estimate of a man who has been in charge of the property and certainly had something to do with it for the last twenty years.

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A. My estimate for the 13 months ending December 31, 1939, is that there will be \$85,000 available for such interest, and for each of the years ending December 31, 1940, and December 31, 1941, \$61,900 in each year.

Q. In making up this estimate of \$61,900 for each of these two years, what did you assume with respect to the rent rolls? A. I assumed that the rent roll would be the same as the May 1, 1939 rent roll with certain adjustments, for temporary leases, and for this lease that expires soon.

533

Q. What did you do about the operating and maintenance expenses? A. I used the operating and maintenance expenses on the basis of the last full years' operating and maintenance expenses.

Q. Now, assume that this amended plan became effective, how much would the U. S. Realty & Improvement Company, the debtor, be called upon to make good the deficit for the thirteen months ending December 31, 1939? A. Approximately \$35,000.

Q. And how much would they be called upon to contribute for each of the years 1940 and 1941? A. \$49,000 in each year.

534

Q. And that is your best estimate of what this debtor will have to be out of pocket if it makes good on its guarantee under this amended plan? A. Yes, sir, it is.

Q. Have you prepared a statement showing the estimated net income of Trinity Buildings Corporation of New York City for the three years and one month ending December 31, 1941, available for payment of interest? A. Yes, sir.

Meeting of Creditors before Judge Leibell—June 28, 1939
Arthur J. Flohr—for Debtor—Direct.

Q. Is this the statement which you have prepared? A. Yes, sir, it is.

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Mr. Hartfield: I offer it in evidence, and I will furnish a copy of that to anyone who tells us that they want it.

(Marked Debtor's Exhibit 3.)

Mr. Hartfield: Now, your Honor, I think that is a good place to stop. We have got something else. Of course we want to put in these formal documents,

The Court: What is the last paper?

Mr. Hartfield: This is an estimate, you know, of the income of Trinity Buildings Corporation for the three years and one month ending December 31, 1940, showing the amounts available for payment of interest.

536

My attention has been called to one question where I may have misled you.

Q. With respect to the R. F. C., as I understand it, counsel discussed that with the R. F. C. but no formal application was filed. Is that your understanding? A. Yes, sir, that is my understanding.

The Court: Now the cross examination of this witness will take place on July 7th.

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Mr. Hartfield: May I ask one more question of the witness?

The Court: Yes.

*Meeting of Creditors before Judge Leibell—June 28, 1939.
Arthur J. Flohr—for Dehtor—Direct.*

By Mr. Hartfield:

538 Q. I asked you what the United States Realty & Improvement Company would commit itself under this guarantee and would be out of pocket, and you gave us certain amounts for the year 1939 and also for the years 1940 and 1941. Did that computation include any of the amounts that were under the amended plan to be added to the principal at the end, if the contingent interest over and above the fixed interest was not earned and paid? A. No, sir, it did not. It allowed only for the fixed interest of three per cent.

539 Q. So in computing the obligation incurred by the United States Realty and Improvement Company and to be contributed by it, you must add this one per cent for the first five years and two per cent for the next five years? A. Yes, sir.

(Adjourned until Friday, July 7, 1939, at 10.30 a. m.)

**Adjourned Meeting of Creditors before Judge
Leibell—July 7, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Bankruptcy No. 74,023.

541

[SAME TITLE]

Before:

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 7th, 1939;

10:30 o'clock a.m.

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A P P E A R A N C E S :

WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph M. Hartfield, Esq., &

Joseph A. Bennett, Esq., and

Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.

Attorneys for Ralph W. Earl and

Donald M. Halsted, as member

of Bondholders Protective Committee.

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SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee
of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and

H. McAfee, Esq., of Counsel.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.
Statement.*

DAVIS, POLK, WARDWELL, GARDINER & REED,

Esqrs.,

Attorneys for Guaranty Trust Company
of New York, as Trustee;

J. Howland Auchincloss, Esq., of Counsel.

I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a
creditor.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage certificate
holders.

JAMES L. BARGER, Esq.,

Attorney, appearing for himself.

VINSON KRISTELLER & SWIFT, Esqrs.,

Attorneys for R. Gilbert Jackson;
Frederic W. Dillingham, Esq., of Counsel.

J. A. PANUCH, Esq.,

Attorney for Securities & Exchange
Commission. Amicus Curiae;

Samuel H. Levy, Esq., and

George Zolotar, Esq., of Counsel.

HENRY BEST, Esq., Attorney for Estate of Miner Tonnelle.

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Mr. Rickaby: I ask your Honor's leave to file objections
to the plan here, copy of which has been served on counsel for
the debtor.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

The Court: Yes; but I wish to announce that before you file your objections, I have not approved of the application for intervention by the various committees because there is a question in my mind as to whether, under Chapter XI of the Chandler Act, and this is a proceeding under that chapter, any committee can be recognized except a committee that is elected at the first meeting of creditors.

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I am going to hear you all as friends of the court until you convince me that I have the right, under the provisions of the Act, to permit these three creditor committees to intervene. I would like to be able to do it, if I can. At any rate, I intend to hear you and I will extend your time to file objections until I formally dispose of your applications for leave to intervene. I will let you file these objections informally, so they are before the Court, as representations made by these various committees in the capacity of *amicus curiae*.

548

Everybody will be heard, but from what I have been able to gather, in looking at Chapter XI, I doubt whether any committee has any standing except a committee elected at the first meeting of creditors. There are two opinions in this court, you know, written on that subject. Of course, they relate to allowances but they also cover generally what the procedure should be under Chapter XI. Of course, under Chapter X, which related to a reorganization, where secured obligations of the debtor are being reorganized, they have very similar provisions to what they had under 77B of the old Act, and various committees may be recognized as committees to intervene; but under Chapter XI, which is supposed to be the simplest kind of proceeding, there is only one committee that it indicates.

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Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

Mr. Rickaby: It would make very little practical difference, your Honor, whether we spoke in behalf of a committee or whether we spoke in behalf of—

The Court: It makes a difference, and the word practically, as you use it, applies to one or two reasons why it would make a difference. It is very practical as to whether or not I can make an allowance to a committee. That is No.

Apparently under Chapter XI the only committee to which the Court could make an allowance in this proceeding is a committee elected at the first meeting of creditors. Judge Patterson so ruled.

Mr. Rickaby: So far as I am concerned, that is not a matter of primary interest here.

The Court: That may be true of all, as well as yourself, but, nevertheless, we have to look ahead. That is one reason. The other reason is this, that these committees have been selected, some of them in advance of the proceeding itself, and there is not any provision for any such committee under Chapter XI. Chapter XI was supposed to cover the simplest kind of arrangement by an ordinary debtor who had practically nothing but unsecured creditors.

Mr. Rickaby: It is to reorganize a delicatessen store, practically.

The Court: Well, it would relate, I should say, to simply matters of adjustment of obligations of the average small business man.

Mr. Rickaby: Small business man, of course.

The Court: And the report of the committee so indicates, that it was intended for that purpose. However, from what I have been able to see, from the papers in this case, it would appear that the present debtor could at least technically

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

qualify under the provisions of Chapter XI. I will hear argument on that later from the three committees. I will so state on the record. The so-called Trinity Buildings Corporation Bondholders Committee, headed by Mr. James A. Beha, and represented by Simpson, Thacher & Bartlett, will be heard as a friend of the Court in this proceeding. Likewise, the so-called Earl Committee, headed by Ralph W. Earl, and represented by William E. Bardusch, will be heard as a friend of the Court in this proceeding. So also the committee headed by Peter Grimm, and represented by Ralph M. Arkush, will be heard in like capacity. The Securities & Exchange Commission, when their representative called upon me, directed my attention to certain objections that they thought existed to the proceeding. I told the representative to communicate with the other attorneys and serve them with a memorandum. Has that been done?

Mr. Panuch: Your Honor, I have here the memorandum and notice which were served on the four amicus curiae committees, with proof of service, which I would like to hand up to you.

The Court: You wish to appear in that capacity in this proceeding?

Mr. Panuch: Yes, your Honor.

The Court: Under Chapter XI it does not appear that the Securities & Exchange Commission is a necessary party or that notice must be given, but I will permit you also to be heard in the capacity of a friend of the Court, the same as the three committees.

Is there anyone else who would like to obtain some representation here?

We have three committees and we have the Securities & Exchange Commission.

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*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Mr. Brozan: If your Honor please, on my application—

The Court: That is right, yesterday. You represent two bondholders?

Mr. Brozan: Yes, sir.

The Court: And I denied your application for leave to intervene, but I told you that you might attend and would receive notice of all hearings and that you would be given an opportunity to be heard, but I cannot recognize every attorney, who represents two or three bondholders because, as I explained to you in chambers, we would never finish with the proceeding, if that were the case, but any matter that you think should be called to the attention of the Court, you may present.

Mr. Dillingham: May I have the same leave? I represent one bondholder.

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ARTHUR J. FLOHR, resumed the stand, testified further as follows:

Direct Examination by Mr. Hartfield (Continued):

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Q. Mr. Flohr, attached to this amended modification plan and agreement dated May 1, 1939, at pages 12 and 13 thereof, is a balance sheet. Have you that before you? A. I believe I have one somewhere. Oh, I have it.

Q. I want to ask you this: Is that a balance sheet as certified by the auditors of the company as of December 31, 1938, of the United States Realty & Improvement Company, the debtor corporation? A. Yes, sir.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Q. I would like to have you, if you will, take for the benefit of those present the items appearing on the assets side of that balance sheet and explain each one of the items.

559

The Court: Will you take it for me (indicating)?

The Witness: I do not believe it is in here (indicating). Oh, here it is.

The Court: All right, thank you.

Q. Have you answered the question, is that the balance sheet as found to be correct by the auditors employed by the company as of December 31, 1938, of the debtor, the United States Realty & Improvement Company? A. It is.

560

Q. Have there been changes in that balance sheet between December 31, 1938, and June 1, 1939? A. Yes, sir.

Q. Will you give us the figures of each item as of June 1, 1939, following that balance sheet? Take the first item, cash. What was the balance of cash on June 1, 1939? A. \$335,095.32.

Q. With the exception of some little sums in postage stamps, petty cash, were all those balances on deposit with banks in the City of New York? A. Yes, sir.

Q. Take the "Accounts, notes, accrued interest and dividend receivable." What was the amount of those as of June 1, 1939?

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A. Do you want that figure as of June 1, 1939?

Q. Yes. A. That amount is—

Q. Have you prepared a pro forma estimated balance sheet as of June 1, 1939, after giving effect to certain valua-

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

Arthur J. Flohr—for Debtor—Direct.

562 tions that you put upon the assets shown upon the balance sheet? A. Yes, sir.

Q. Is that paper you have before you that pro forma balance sheet? A. This is it, yes, sir.

Mr. Hartfield: I would like to have this now marked for identification. I will offer it later in evidence, if I may.

(Marked Debtor's Exhibit 4 for identification.)

563 Q. Can you, by looking at this Debtor's Exhibit 4 for identification, tell us what the accounts receivable and accrued interest receivable were as of June 1, 1939? A. Yes, sir, miscellaneous accounts receivable amount to \$3,515.07, and interest accrued on investments amount to \$55,469.73, all of which are good and collectible.

Q. What do you make the aggregate of those two amounts? A. \$58,984.80.

Q. What do you make the total of current assets, as of June 1, 1939, of the debtor? A. \$394,080.12.

564 Q. Is the explanation of the reason why the accrued interest is so much larger as of June 1, as compared with December 31, that five months of the six months period had expired on June 1 while as of December 31 it was at the end of an interest period? A. That would be generally so, yes, sir.

The Court: What about that item of \$175,000, Plaza Operating Company, 4 per cent, shown on page 12?

The Witness: That was subsequently renewed, your Honor, and now is not current.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

The Court: It appears as an asset elsewhere?

The Witness: Yes, sir, right below, \$137,500, on your little green sheet.

Mr. Hartfield: I will take that up in order, your Honor, if that is agreeable.

Q. As I understand it, that item that appears on sheet 12, notes receivable, Plaza Operating Company, is no longer a current asset, is that correct? A. That is right.

The Court: While you are on it, explain why that is.

Mr. Hartfield: Let me take it up. I pledge you I won't skip it but I would like to take it up in the order in which these appear on the balance sheet.

Q. The next one, sinking fund deposit. That remains the same, does it \$60.14? A. Yes.

Q. When we come to investments in and advances to subsidiaries, in the printed balance sheet it shows an aggregate for this account of \$20,428,489.04, is that not correct? A. Yes, sir.

Q. In Debtor's Exhibit 4 that has been reduced to \$5,337,875. Is that true? A. Yes, sir.

Q. Will you take each item which appears under that investment in and advances to subsidiaries, and explain just what change has been made in each item and the reason therefor? A. The first item of Trinity Buildings Corporation represents note, open account and stock of that corporation held by the debtor.

Q. Of that aggregate of \$11,442,482.99, how much of it was stock? A. \$1,000,000.

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7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

568 Q. So if you deduct \$1,000,000 from \$11,442,482.99, which represents \$10,442,482.99, you have the amount due the debtor from the Trinity Buildings Corporation, the owners of 111 and 115 Broadway, either upon note or upon moneys advanced to it; is that right? A. That is right.

Q. Why have you listed this indebtedness or investment of \$11,442,000, in round figures, as without value on this Exhibit 4 for identification? A. Well, for the reason that it seemed in view of this proceeding it would be very hard for us to realize anything on that investment, and it is our opinion that we could not at this time.

569 Mr. Bardusch: I object to that. They have not qualified this witness to give opinions on value here.

The Court: We will take it subject to cross-examination.

Q. Mr. Flohr, how long did you say you have been connected with the debtor? A. Over 30 years.

Q. What has been the business of the debtor during that period? A. Real estate business.

Q. Have you during all that period of 30 years had to do with real estate and real estate values, particularly in New York City? A. Yes.

570 Q. What has been your particular function with the company? A. Well, for 20 years I have been associated with the financial end of the company.

Q. In connection with the financial affairs of the company? A. Yes.

Q. Was it necessary for you to be familiar with the income and the expenses of operation of the various parcels of real property owned by the company or its subsidiaries? A. Yes.

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Arthur J. Flohr—for Debtor—Direct.

Q. Have you during that time kept informed of the current rentals that were obtainable from properties in the City of New York—those owned by the debtor or its subsidiaries?

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A. Yes, sir.

Q. And with the expenses of operating properties of the kind such as 111 and 115 Broadway and the other properties owned by the debtor or its subsidiaries?

A. Yes, sir.

Q. Take the next item, Lawyers Building Corporation, \$1,309,059.46. What does that represent? A. That represents a note of the Lawyers Building Corporation of \$1,274,059.46, advances on open account of \$25,000 and 100 shares of the capital stock of the corporation, carried on the books at \$10,000.

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Q. What properties did the Lawyers Building Corporation own? A. The Lawyers Building Corporation is the owner of an office building in Boston, Massachusetts.

Q. Is there any mortgage on that building? A. There is a \$670,000 mortgage.

Q. What rate of interest? A. 4 per cent per annum.

Q. At the present time will you tell the Court whether or not the earnings of the Lawyers Building Corporation, this piece of property in Boston, are sufficient to meet the interest requirements of the mortgage and the taxes on the property? A. No, sir, they are not.

Q. By what amount do the present earnings on this building in Boston fail to earn the interest and the taxes and carrying charges upon the property? A. For the 12 months ended December 31, 1938, they failed to earn the interest and taxes by \$4,300. That is before the deduction of any depreciation.

Q. So that if depreciation was added, the amount of \$4,000

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Arthur J. Flohr—for Debtor—Direct.

plus would be increased by the amount of the depreciation?

A. Yes.

Q. In view of the fact that the property fails to earn sufficient to pay taxes and interest, what have you, upon Debtor's Exhibit 4 for identification, put the value of this investment in the Lawyers Building Corporation? A. At no value.

Q. Based upon your experience do you believe that the interest of the debtor in the Lawyers Building Corporation could be disposed of for any sum at this time? A. No, sir, I do not believe it could.

Q. Take the next item, G. A. F. Realty Corporation, \$500. Will you tell us what that is? A. That is an investment of the stock of the G. A. F. Realty Corporation, now inactive, that has no assets other than a small amount of cash.

Q. I don't want to spend much time on it. On Debtor's Exhibit 4 for identification you have reduced that \$500 to \$375. Why is that? A. That is the amount of cash in the bank.

Q. With the exception of that cash, you state to the Court that the debtor cannot realize anything upon this investment in the G. A. F. Realty Corporation or its obligation due from that company? A. Yes.

Q. Do you state to the Court that the \$375 represents the full amount that can be realized either from the obligation or investment in that corporation by the debtor? A. Yes, sir.

Q. Take the next item, Whitehall Improvement Corporation, including mortgage receivable of \$4,000,000 pledged to secure note payable of \$3,000,000, \$7,676,445.59. What does that represent? A. Represents a mortgage of \$4,000,000. A note—

Q. Before you go to the note, tell us about that mortgage. What property does that cover? A. Covers the Whitehall Building.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Q. That Whitehall Building is the big building located at 17 Battery Place? A. Yes, sir. 577

The Court: Is that a first mortgage?

The Witness: First mortgage.

Q. That is a first mortgage of \$4,000,000. Does the debtor have that mortgage in its vaults? A. It is pledged to secure a loan of \$3,000,000, a bank loan of \$3,000,000.

Q. That is a loan of the debtor to what bank? A. National City Bank.

Q. When does the note that the debtor has given to the National City Bank become due? A. On August 12, 1939. 578

Q. How long a mortgage is this \$4,000,000 mortgage, which the debtor held on the Whitehall Building and which it assigned as collateral for this \$3,000,000 indebtedness which it owes to the National City Bank? A. It is a mortgage due 90 days after demand.

Q. Who holds title to the Whitehall Building at 17 Battery Place? A. Whitehall Improvement Corporation.

Q. Is that a wholly owned subsidiary of the debtor? A. Yes, sir.

Q. What is the rate of interest upon this \$4,000,000 mortgage of the subsidiary, Whitehall Improvement? A. Six per cent per annum. 579

Q. And that produces, if my mathematics are correct, \$240,000 a year? A. Yes.

Q. Out of that \$240,000 how much are you now paying the National City Bank on account of interest on your \$3,000,000 note? A. \$120,000 per year, approximately.

Q. Are you able to sell or dispose of this \$4,000,000 mort-

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

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gage without paying off your \$3,000,000 note to the National City Bank? A. No, sir.

Q. Describe briefly this piece of property at 17 Battery Place. A. It is a 32-story, fireproof, brick and limestone office building, with a rentable area of approximately 545,000 square feet. It is on a parcel of real estate the area of which is approximately 65,000 square feet. The real estate is not entirely covered by the building.

Q. Has this building been recently appraised by the real estate firm of Brown, Wheelock, Harris & Stevens, Inc., I think the name of it is now. A. Yes, it has.

Q. What did they appraise this property at? A. At \$5,250,000.

Q. In addition to the \$4,000,000 mortgage pledged to secure the \$3,000,000 note, do you hold any note of this subsidiary that owns 17 Battery Place, the Whitehall Improvement Corporation? A. Yes, sir.

Q. How much is that note? A. \$3,675,945.59.

Q. What was the maturity of the note? A. That note matured on June 30, 1939, but will be extended.

Q. What rate of interest does that note bear? A. 2 per cent per annum up to June 30, 1939.

Q. How much income did you get from that note? A. At the rate of \$73,500 per annum.

Q. Based on your own opinion of the value of this property and this appraisal of Messrs. Brown, Wheelock, Harris & Stevens, Inc., what would be the value of this note of \$3,675,945.59 as of June 1, 1939? A. Based on the appraisal, this note would have a value of approximately \$1,200,000.

Q. How many shares of stock, being all the stock of this Whitehall Improvement Corporation, does the debtor own? A. 5 shares of par value of \$100 each.

*Adjourned Meeting of Creditors before Judge Leibell—July
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Arthur J. Flohr—for Debtor—Direct.

Q. How much was that stock carried on the book of the company as of December 31, entering into the total figure of \$7,676,000 plus? A. I would say that had no value.

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Q. I mean, how much was it carried on the books at? A. \$500.

Q. You said the stock has no value. Does it produce any income? A. No, sir.

Q. Turning to Debtor's Exhibit 4 for Identification, you have on this pro forma balance sheet, carried this item formerly at \$7,676,445.46 at \$5,200,000. Will you explain that figure? A. I based that entirely upon the appraisal of Brown, Wheelock, Harris & Stevens, Inc.

Q. Was there included in the \$5,200,000 the \$4,000,000 mortgage which is pledged to secure your \$3,000,000 note? A. Yes.

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Q. The \$1,200,000 represents your determination of the fair value and the realizable value of the \$3,675,000 note and the stock investment which you told us about? A. Yes.

Q. So that no one will be misled about it, in this \$5,200,000 item, which appears on Debtor's Exhibit 4 for identification, you have on the assets side made no deduction of the \$3,000,000 note which will appear on the liabilities side, that is, the note under which the mortgage is pledged, is that correct? A. Yes, sir.

Q. Take the next item of Plaza Operating Company, non-interest bearing demand note in principal amount of \$3,930,000, carried on page 12 of this balance sheet at one dollar, and I will also ask you to go back and consider, under the current assets item, note receivable, Plaza Operating Company, \$175,000, about which the Court asked you a question, and at my request deferred your answering of it until now.

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*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Will you explain how you carried those two items on this pro forma balance sheet, Debtor's Exhibit 4 for identification?

A. The note of the Plaza Operating Company, in the principal amount of \$137,500, which is the \$175,000 note as of December 31 reduced by a payment on account since then, is carried at that amount on the pro forma estimated balance sheet.

Q. In your opinion does that represent the full value of that asset as of this date, \$137,500? A. Yes, sir.

Q. Is the fact that the new note is not due until August 30, 1940, the reason why you do not longer carry that as a current asset? A. Yes, sir.

Q. But you carry it at the same figure as it was carried before; less the \$37,500 which has actually been paid on the note? A. Yes, sir.

Q. Why is it you carry it, both on December 31 and now, this note of Plaza Operating Company, being \$3,930,000 and the 25,000 shares of preferred stock and the 34,483 shares of common stock at only a nominal value of one dollar? A. Plaza Operating Company is not earning sufficient to meet the requirements of its first mortgage and until it does meet those requirements, it is my opinion that this note and the stock of the Plaza Operating Company owned by the debtor has no readily realizable value. It may have some potential value but it certainly could not be disposed of at the present time for any amount near its face value or any amount that would not cause a great sacrifice on the part of the company.

Q. Before we leave that \$137,500 note, is that note pledged to secure any note executed by the debtor? A. Yes, sir, it is pledged to secure a note for a similar amount executed by the debtor to the Manufacturers Trust Company.

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7, 1939.*

Arthur J. Flohr—for Debtor—Direct.

Q. What rate of interest does that note of the debtor to the Manufacturers Trust Company bear? A. 4 per cent. — 589

Q. Under the circumstances, if this note is a 4 per cent note and you are paying 4 per cent to the Manufacturers Trust Company, do you receive any net income from such note? A. No, sir.

Q. Could the debtor dispose of this \$137,500 note so long as its indebtedness to its pledgee, Manufacturers Trust Company, is unpaid? A. No, sir, it could not.

Q. As far as the big note, going back to that, this non-interest bearing note of \$3,930,000, does it pay any current interest? A. No.

Q. When was the last date the company received any interest on this note? A. 1933. 590

Q. Do I understand that for more than six years you have received no interest of any kind on this \$3,930,000 note? A. We haven't received any since 1933.

Q. Why haven't you collected any interest on the note? A. The earnings of the Plaza Operating Company were not sufficient to pay any interest on the note.

Q. With respect to the stock, if the note of \$3,930,000 has paid no interest for six years because of lack of earnings, is there any value to this stock? A. I would say there is none.

Q. Does that company own any real estate? A. It owns the Plaza Hotel. 591

Q. And the Plaza Hotel is located at Fifth Avenue and 39th Street? A. Yes, sir.

Q. Is there a first mortgage upon that property? A. Yes, sir.

Q. How large is that first mortgage? A. \$6,800,000.

Q. What rate of interest does that first mortgage bear? A. 4 per cent.

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Arthur J. Flohr—for Debtor—Direct.

Q. Is there any provision in that mortgage for amortization out of earnings? A. Yes, sir, there is.

Q. So that I am correct in understanding that the first earnings of that property, if there should be any, over and above the interest on the \$6,800,000 and the taxes, would have to be used in amortizing the principal of that mortgage before anything could be received on your \$3,930,000 note? A. Yes, sir, that is true.

Q. How much under the provision of this Plaza Operating Company, how much would have to be earned in excess of the interest and tax requirements of the mortgage before any amount would be available to the debtor on its \$3,930,000 note? A. \$300,000 a year.

Q. So that in addition to earnings taxes and the interest, \$300,000 amortization has to be earned before there could be any sum available even for interest on this \$3,930,000 note? Yes, sir.

Q. How many rooms has this hotel, approximately? A. Oh, in excess of a thousand.

Q. What height is it? A. It is an 18-story, fireproof hotel.

Q. What were the earnings of the Plaza Operating Company in excess of interest on the mortgage but before considering depreciation for the year ending December 31, 1937, and for the year ending December 31, 1938? A. For the year ended December 31, 1937, they were \$178,973.72, and for the year ended December 31, 1938, \$115,803.23.

Q. Do I understand that for the year ending December 31, 1937, in round figures, they missed earnings of \$300,000 required for amortization by \$121,000? A. Yes.

Q. And for the year ending December 31, 1938, in round figures, they missed it by \$185,000? A. Yes, sir.

Q. Did I correctly understand you, that these are figures

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Arthur J. Flohr—for Debtor—Direct.

before depreciation and that if you add the proper amount of depreciation upon a building of this character, such as a big hotel building, these deficits would be even larger? A. Yes, sir.

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Q. Have you the figures as to what was earned towards this \$300,000 amortization for the five months ending May 31, 1939? A. Yes, sir.

Q. How much were they? A. \$50,858.62.

Q. Take it on a monthly basis. What was the amount that should have been earned to ward this \$300,000 amortization payment required under the first mortgage for five months? A. \$125,000.

Q. So that in round figures for the five months the Plaza Operating Company failed to earn its required payment under the mortgage, exclusive of depreciation, by about \$75,000? 50 from 125 would be 75, wouldn't it? A. I would like to say they were not required to make those payments unless they are earned.

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Q. I appreciate that. A. At this time.

Q. But I mean, you failed to earn what you would have been required to pay if the interest had been earned by \$75,000? A. That is right.

The Court: 5 per cent for the entire year?

The Witness: No, sir; we are required to pay \$300,000 a year after this note of \$137,500 is paid off, one hundred and fifty of it fixed and one hundred and fifty if earned. One hundred and fifty must be paid whether or not it is earned and one hundred and fifty if it is earned.

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Q. Take the years 1937 and 1938, was the Plaza Operating Company able to obtain a reduction in the rate of interest

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that it was required to pay on this \$6,000,000 plus mortgage?

A. I did not catch the years.

Q. 1937 and 1938. A. I did not quite understand the question.

Q. I mean by that, what rate of interest did Plaza Operating Company, on the \$6,800,000 mortgage, have to pay during the years 1937 and 1938. A. (No answer.)

Q. If you don't know—

The Court: You said something about 4 per cent before.

Mr. Hartfield: It is a 4 per cent mortgage, but my information is that the mortgagee allowed them to pay only 3 per cent because—

The Witness: The mortgage was renewed for five years from May 1, to the best of my recollection, 1936, at 3 per cent for two of those five years and at 4 per cent for the other three of the five years.

Q. So that for all of those years, and in giving these figures of 1937 and 1938, you had the benefit of that concession by the mortgagee of the interest reduction to 3 per cent per annum?

A. Yes, sir.

Q. Up to May 1, 1938? A. Yes, that is right.

Q. If you had had to pay the interest that you had to pay after May 1, 1938, of 4 per cent, the figures would have been even worse than you told us about, is that correct? A. Yes.

Q. What is the aggregate of the figures that you show on Debtor's Exhibit 4 for investments in and advances to subsidiaries, carried on the balance sheet as of December 31, 1938, at \$20,428,489.04? A. \$5,337,875.

Q. Take the next item of the assets side of the balance sheet on page 12, investment in George A. Fuller Company, and which is carried at the total of \$786,493, and which you carry on the pro forma balance sheet, Debtor's Exhibit 4 for

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identification at this date at \$477,300. Will you tell us what that asset represents and why you have reduced on the pro forma balance sheet the value of this asset? A. It represents 7,786 shares of 4 per cent cumulative convertible preferred stock, par value \$100 per share, and 7,893 shares of common stock, par value \$1 per share of George A. Fuller Company, approximately 23 per cent of the voting power of that company, and the values placed on the pro forma balance sheet are based on the quoted market value on the New York Curb Exchange of such stock on June 1.

Q. Do I understand from what you have just told me that on your balance sheet you carried those shares at the par value of \$786,493? A. Yes.

Q. But that on the pro forma balance sheet you have carried them at the quoted market value for the shares on the New York Curb Exchange as of June 1, 1939? A. Yes, sir.

The Court: That is how much?

The Witness: \$477,300.

Q. Is that stock regularly traded in on the New York Curb Exchange? A. It is rather inactive.

Q. But is quoted from time to time, is it? A. There is always a bid and ask price quoted.

Q. Tell us about the shares of the preferred and the shares of the common stock that are pledged. A. Of this stock, 7,334 shares of the preferred stock and 3,667 shares of the common stock are pledged with the Manufacturers Trust Company to secure the note of the debtor to the Manufacturers Trust Company for \$137,500.

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The Court: Is that that same note you mentioned before?

The Witness: Yes, sir.

Q. Is it also deposited to secure a note of the Plaza Operating company? A. It was deposited to secure a guaranty on a note of \$50,000 of the Plaza Operating Company to the same bank, guaranteed by the debtor, but this note has since been paid off.

Q. Was the note originally \$50,000 or \$100,000? A. It was \$100,000 originally.

Q. Since April 1, 1938, has George A. Fuller Company paid dividends on the preferred stock? A. Yes, sir, it has.

Q. Has it paid any dividends on the common stock? A. No, sir.

Q. What have you been receiving as income from the shares of the preferred stock of the George A. Fuller Company? A. At the rate of \$31,144 per year. That is \$4 per share.

Q. How much unpledged stock of the George A. Fuller Company did you hold on January 1, 1939? A. 452 shares of preferred stock and 4,226 shares of common.

Q. What was the quoted market value of this unpledged stock on June 1, 1939? A. \$110,600.

Q. Do you believe that the narrow market which you have told us about, that exists for this stock on the Curb, that you could sell any such block as you hold, if you had to sell it at forced sale at anything like these prices? A. No, sir. I do not.

Q. As I understand it, you have carried the preferred stock at the full quoted value as of June 1, 1939, on this pro forma

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balance sheet, Debtor's Exhibit 4 for identification? A. Yes, sir. I have.

Q. In this figure of \$477,300, you have not made any deduction of any indebtedness for which that stock is pledged?

A. No, sir.

Q. Take the next item, mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds, which appears on page 12. However, before I leave that item of this \$137,500 note, held by the Manufacturers Trust Company, what was the amount of this note originally when the collateral was deposited, if you recall? A. \$550,000.

Q. So the note has been reduced from \$550,000 to \$137,500 since the collateral was pledged? A. Yes, sir.

Q. Going back to this item of \$682,317.10, which you carry on this pro forma balance sheet at \$555,654, will you explain, please, the reason for that change in valuation? A. Well, there are a number of items. Do you want me to take each one up by itself?

Q. Yes, will you, and very briefly go over it. A. There is a one-half interest in a second mortgage of \$323,875, covering two 5-story tenements at 1602-04 York Avenue, New York, which is carried on the books of the debtor at \$1.00. This mortgage originally covered several additional parcels of real estate adjoining 1602-04 York Avenue, New York—

The Court: What street is that? Does anyone know?

Mr. Marx: East 85th Street.

The Witness: But it is in New York.

The Court: But what street?

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Mr. Hartfield: East 85th Street and York Avenue.

The Witness: Yes, 85th.

The Court: Second mortgage or first mortgage?

The Witness: No, sir, it is a second mortgage.

A. (Continuing) This mortgage originally covered several additional parcels of real estate adjoining 1602-04 York Avenue, New York, which were dropped by the owner to the holders of the first mortgages.

Q. When you say "were dropped by the owner to the holders," you mean they permitted the first mortgage holder either to foreclose or receive a deed to the property so that title was surrendered to the holders of the first mortgage?

A. One way or the other, yes, sir. The existing first mortgages on 1602-1604 York Avenue aggregate \$25,000. The second mortgage is past due and no interest has been paid since April, 1931.

The Court: Is that a corner?

The Witness: No, sir, it is not.

A. (Continuing) And the value of our interest in this mortgage is extremely doubtful. I do not believe that it could be sold at this time except at a great sacrifice.

A first mortgage on Breslin Hotel at Broadway and 29th Street, and 14 West 29th Street, New York, which adjoins the Breslin Hotel, in the principal amount unpaid at June 1 of \$520,416.74. The Breslin Hotel is a 12-story hotel containing approximately 400 rooms. 14 West 29th Street is a five-story brick building. The mortgage bears interest at the rate of 3 per cent per annum to May 31, 1942, and 4 per cent per annum from that date to June 1, 1957, when it becomes due. Amorti-

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zation payments thereon are as follows: \$416.66 per month to June 1, 1939, and \$2,500 per month from July, 1939, to June 1, 1940, and \$416.66 per month from July 1, 1940 until maturity.

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The mortgage is carried on the books of the debtor at its face value. At the present rate of interest it yields income to the debtor of approximately \$15,000 per annum. It is held free and clear by the debtor and is not pledged. It is my opinion that this mortgage has a value of \$400,000 but efforts on the part of the debtor to dispose of it at that price have proven unsuccessful.

Q. Do I understand that in this Debtor's Exhibit 4 for identification you have carried that item at \$400,000? A. \$400,000.

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Q. Go ahead. A. A first mortgage on a six-story tenement house at 337-339 East 49th Street, New York, in the principal amount of \$34,000. This mortgage bears interest at the rate of 3½ per cent per annum until March 1, 1940, and 4 per cent per annum from March 1, 1940, to March 1, 1943, when it becomes due. Amortization payments of \$85 are due quarterly until maturity commencing June 1, 1939. The mortgage is carried on the books of the debtor at its face value. It is held free and clear and is not pledged. It yields an income of approximately \$1,200 per year. I believe that the mortgage is worth its face value but do not believe that it could be sold for that amount at this time.

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Q. Have you now explained the reason for the change in the figures of \$682,317.10 to \$555,654.95? A. Did I cover them all?

Q. Don't you have to cover investments in other real estate companies, page 13 of your memorandum?

The Court: What is this unimproved real estate?

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Mr. Hartfield: No, investments in other stocks and bonds.

A. I see. I have it. 150 shares of capital stock of Copley-Plaza Operating Company, being 20 per cent of the outstanding shares of such company. They are carried on the books of the debtor at \$1.00 since they yield no income and are believed to be worthless. The Copley-Plaza Operating Company is the lessee of the Copley-Plaza Hotel in Boston, Mass., and its lease expires on January 1, 1942. Since June 1, 1932, the Copley-Plaza Operating Company has been paying its entire earnings to the landlord as rent and at June 1, 1939, there was in excess of \$1,400,000 of the rent called for under the lease unpaid. The situation as regards this lease is no better now than it has been for the past several years.

5 shares of capital stock of U. S. R. Management Corporation, a 50 per cent ownership thereof, carried on the books of the debtor at par \$500. This stock has a book value of approximately \$750, and probably could be disposed of for this amount. These shares yield no income.

Q. On this pro forma balance sheet at what price do you carry it? A. \$750.

Q. Go ahead. A. 5000 shares of stock of the Van Sweringen Corporation, carried on the books at \$312.50, being the quoted market value as of December 31, 1937. At June 1, 1939, there was no market for these shares that I could find. They yield no income and they are carried on the pro-forma balance sheet at no amount.

3509 shares of preferred stock of Alliance Realty Company which are carried on the books at \$24,808.50, the quoted market value as at December 31, 1938. The quoted market as at June 1, 1939, was approximately \$17,545.

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Arthur J. Flohr—for Debtor—Direct.

Q. In what amount are they carried on the pro forma balance sheets? A. At \$17,545.

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38,649 shares of common stock of Alliance Realty Company, which are carried on the books at \$2,415.56, the quoted market value as at December 31, 1938.

The quoted market value as at June 1, 1939, was approximately \$1,900. They are carried on the pro forma balance sheet at \$1,932.45.

Q. Is there any active market for either the preferred or common stock of these companies? A. No, sir, they are sold over the counter and there are very few shares traded in.

Q. If you wanted to sell that number of shares, could you get in your opinion the quoted market price for them? A. I do not believe so.

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Q. Do either of these shares yield any income? A. No, sir.

Q. If you could sell them at all, would it be necessary for you to make a sacrifice in your opinion of below this figure of \$1900? A. I believe if we tried to sell all of them we would have to sell them for something a good deal under that.

Q. Go ahead. A. Voting trust certificates representing 8,730 shares of common stock of Stevens Hotel Corporation, the owner of the Stevens Hotel in Chicago, Illinois, which are carried on the books at \$1.00 and believed to be of very doubtful value. These shares yield no income, and the prospect for any income is not good. They are carried on our pro forma balance sheet at \$1.00.

621

3 shares of capital stock of Usall Realty Corporation, being a 50 per cent ownership, and advances on notes of \$441,170.85, carried on the books of the debtor at \$1.00. These shares and advances are of very doubtful value, and I do not believe that the amount for which they might be disposed of at this time

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would exceed \$10,000. They are carried on the pro forma balance sheet at \$10,000.

3 shares of capital stock of Onarwa Realty Company, being a 50 per cent ownership, and advances of \$2,325 carried at \$1,750 on the books of the debtor. These shares produce no income but probably could be disposed of at the amount at which they are carried, and are carried on the pro forma balance sheet at \$1,750.

3108 shares of second preferred stock and 2235 shares of common stock of Beaux-Arts Apartments, Inc., which are carried on the books at \$1.00 and are believed to be of little value. These shares yield no income.

Q. Referring to this Beaux-Arts property, do you know whether there are a first and second mortgage on the real property owned by the company? A. No, there is not. There is first preferred stock.

Q. Is this stock which you have second preferred and common? A. Yes, sir.

Q. Do you know whether or not the company is able to earn and to pay the full amount of dividends on the first preferred stock? A. It has not for some time.

Q. Is there any market value at all for this second preferred and common stock which you have in this company? A. No, sir, none that I know of.

Q. Do you know approximately the amount of the first preferred which is ahead of the second preferred and common which you hold? A. Yes, sir, there are 39,375 shares of six per cent cumulative without par value first preferred.

Q. How many shares, did you say, Mr. Flohr? A. 39,375 shares, of which 2,782 shares have been purchased through the sinking fund and retired.

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Arthur J. Flohr—for Debtor—Direct.

Q. Is there a stated value on that first preferred stock in the event that it is retired? A. There is a minimum liquidation value of \$100 per share. 625

Q. That would make approximately \$3,960,000 that would be ahead of the second preferred and common stock? A. I would say approximately \$3,700,000.

Q. Has there been any accumulating dividend on that for a period of time? A. Well, dividends are unpaid since February 1, 1931, at \$6 per year.

Q. So in round figures you would add to that \$3,700,000 48 per cent cumulative dividends? A. Approximately 48 per cent, yes, sir.

Q. Take the next item, please. A. 14,156 shares of preferred stock and 57,424 shares of common stock of the National Hotel of Cuba Corporation, which are carried on the books at \$1.00 and are believed to be without value. These shares yield no income. 626

Q. Are there any securities of any kind ahead of this preferred and common stock of the National Hotel of Cuba held by the debtor? A. Yes, sir. June 30, 1938, there were \$5,380,100 of 30-year, 6 per cent income debentures outstanding, on which interest was unpaid from September 1, 1931, the accumulated interest amounting to \$2,205,000 June 30, 1938.

Q. As I understand it, these prior securities are held by the public, by others, not in anywise held by the U. S. Realty & Improvement Company? A. Yes, sir. 627

Q. Is it because of these prior obligations that you testified that in your opinion the securities owned by the United States Realty & Improvement Company in the National Hotel of Cuba have no value? A. Yes, sir.

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Arthur J. Flohr—for Debtor—Direct.

Q. You carry them on the pro forma balance sheet as you did on the balance sheet of December 31, at \$1.00, is that right? A. Carry them at no amount. Take out the dollar.

Q. Take the next item. A. 1,512 shares of preferred stock of 110 Fifth Avenue Corporation, par value of \$100 each, which are fully reserved for on the books of the debtor.

Q. What do you mean by "fully reserved for on the books of the debtor"? A. Well, there is a reserve set-up to offset the value of the stock.

Q. In other words, the amount of the reserve you set up on the liabilities side is equal to the amount at which you carried the asset on the assets side? A. Yes.

The Court: Tell us why that is.

Q. Yes.

The Court: You say here is some stock you own, is that right?

Mr. Hartfield: Yes.

A. Well, we have owned it a long time and the directors at one time decided that the stock was worthless and they set up a reserve against it in its full amount.

Q. Why did they decide it was worthless, what about the earnings? Are the earnings sufficient to meet the interest and amortization requirements on the mortgage? A. No, sir, at the present time they are not.

The Court: Why did you need a reserve?

Mr. Hartfield: He has just given you the reason.

The Court: Is there any contingent liability or anything like that?

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The Witness: Well—

The Court: You mean they charged it off?

Mr. Hartfield: That is, in effect, what it means, because the earnings of the corporation were not sufficient to meet the interest and amortization payments on the mortgage. They charge off their investment in the stock by setting up a reserve equal to the investment instead of just writing it off, as is one way of doing it.

The Court: And hold it for another tax year?

Mr. Hartfield: And hold it for another tax year.

Q. Take the next item on your list. A. Voting trust certificates representing 8,576 shares of Class B Common stock of Fuller Building Corporation, carried on the books of the debtor at the nominal value of one dollar, are believed to be of little value but are nevertheless pledged as security for its guarantee of interest, sinking fund and principal at maturity of G. A. F. Realty Corporation, 15-year sinking fund 6 per cent gold debentures, and for the payment of interest, sinking fund and principal at maturity of the 6 per cent sinking fund debentures due January 1, 1944, of the debtor subject to an agreement to surrender such stock to the Fuller Building Corporation in the eventuality of a failure of the Fuller Building Corporation to earn or pay the fixed interest on its first mortgage loans. Such voting trust certificates yield no income. The earnings of the Fuller Building Corporation are not sufficient to meet all of the requirements of the aforesaid first mortgage loans.

Q. At what price were these voting trust certificates, pledged as aforesaid, carried on the balance sheet as of December 31, 1938, and at what price are they carried on the pro forma balance sheet? A. Carried at one dollar on December

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31 31 balance sheet and at no value on the pro forma balance sheet.

Q. In your opinion, based upon your experience, does the carrying of these shares at one dollar and no value representing the actual value as of December 31 and as of June 1, 1939?

A. Yes, sir, in my opinion that is what they are worth.

The Court: Is there an obligation of the debtor as guarantor of certain bonds of this Fuller Building?

The Witness: No, sir.

35 The Court: You said something about these voting trust certificates having been pledged as security for the guarantee of the debtor.

The Witness: Yes, both of the debtor and debentures of the G. A. F. Realty Corporation, which are now really an obligation of the debtor. They are subject to exchange for our 6 per cent debentures but some of them have not been exchanged.

Q. The G. A. F. Realty bonds which are guaranteed by the debtor cover the property at Madison Avenue and 57th Street? A. No, it doesn't cover any property. It is merely debentures.

36 Q. But, I mean, the G. A. F. Realty Company owns the property? A. They don't own it now. They did own it and in reorganization the property was transferred to the Fuller Building Corporation from the G. A. F. Realty Corporation, but the G. A. F. Realty Corporation is an inactive subsidiary now of the U. S. Realty & Improvement Company.

Q. But these voting trust certificates, I understood you to say to the Court a minute ago, were pledged for your guarantee of the interest, sinking fund and principal at maturity of

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the G. A. F. Realty Corporation 15-year sinking fund 6 per cent debentures. A. That is right.

Q. And those debentures are still outstanding? A. Yes, sir.

Q. Take the next item. A. \$54,000, principal amount of bonds of Robert and Minnie H. Kloeppel secured by a second mortgage on the George Washington Hotel, Jacksonville, Florida, which are carried at cost, \$48,600. These bonds produce an income of \$2,160 per annum and they are serial bonds and are being paid when due, and while they could not be disposed of at principal at the present time, they probably could be sold for 75 per cent thereof, approximately \$40,000.

\$179,000 principal amount of income bonds of Savoy-Plaza, Inc. together with voting trust certificates for 2,112 shares of \$1.00 par value Class A common stock carried at the quoted market value as at December 31, 1938, \$49,672.50. The present market value is approximately the same. These bonds could probably be disposed of for this amount, and they are carried on the pro forma balance sheet at the same amount. In addition, the debtor owns voting trust certificates representing 27,350 shares of \$1.00 par value Class B common stock of Savoy-Plaza, Inc., which are carried on the books at \$1.00. Such stock yields no income and the prospects of its yielding any are very remote. There is no quoted market value for it. It has not been pledged.

Q. At what price do you carry those voting trust certificates for 27,350 shares of Class B common stock of Savoy-Plaza, Inc. on this pro forma balance sheet? A. At \$1.00.

Q. That covers, does it, the item which appears on the balance sheet of mortgages receivable, investments in and advances to other real estate companies, and investments in other stocks and bonds? A. I believe it does.

The Court: The first meeting will recess until two o'clock.

(Recess until 2.00 p. m.)

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AFTERNOON SESSION.

Mr. Arkush: If your Honor please, before the examination of the witness is continued, I would like to beg your Honor's indulgence for a moment on the question which your Honor raised this morning as to the position of these committees. I happen to be of counsel in another Chapter XI proceeding which has been pending in this court for several months, namely, the Haytian Corporation. I believe it is the largest case, outside of this one, pending under that chapter, and in that case there was a very vigorous fight between the management and three committees, a four-cornered fight, but before any of the committees, or the management got together on any kind of plan, and more or less at the suggestion of the court or a referee, the committees did cooperate in electing a statutory committee and it seems to be that if a statutory committee is to be elected, it should be done as early as possible and accordingly, I move your Honor that the creditors here represented be permitted now to nominate and elect a creditors' committee under Chapter XI.

The Court: I suggested that this morning, that there should be a formal committee, one elected, and the statute provides for it to be elected at the first meeting of creditors, and this is the adjourned first meeting of creditors.

Mr. Arkush: For that purpose, your Honor, on behalf of the Grimm Committee, I would like to nominate Mr. Peter Grimm, who is chairman of that committee, and Mr. Charles F. Simmons, its president, as his alternate, in case Mr. Grimm cannot attend.

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The Court: May I make a suggestion. Here are three committees. I do not suppose the debtor itself wants to vote—they have powers of attorney but they won't want to vote any power of attorney even indirectly in connection with the election of a committee.

643

Mr. Arkush: I do not think they are permitted to under the act.

The Court: Why not merge these three committees?

Mr. Arkush: The reason we cannot do that at this time, as your Honor probably gathered at the last hearing, is that at the present time the committees do not see eye to eye. I do not know to what extent the Beha Committee and the Earl Committee are in unison, but we have not, in our literature or in our conversations with the bondholders disapproved this plan. The plan is acceptable to us subject to some reservations which we think rather minor reservations and ones which ought to be acceptable to the company. We have communicated those to the company and they have not given us a reply, but subject to that reservation—

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The Court: How about powers of attorney?

Mr. Arkush: We are all equipped with powers of attorney.

The Court: Is your committee properly equipped with powers of attorney to vote the claims?

645

Mr. Rickaby: We have powers of attorney to represent them. We do not care particularly about voting the claims. As a matter of fact, our powers of attorney here are not acknowledged. We have not asked to have them acknowledged and there may be some question about that.

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Mr. Arkush: We do not raise that question.

Mr. Rickaby: I do not think anybody has raised that question.

The Court: Perhaps the Court would not shut its eyes to that, that is the point.

Mr. Rickaby: In view of the position we have taken, we have not asked to be counted as consenting to or rather we have been opposing this question on the question of law, based on the evidence, that it is unfair.

The Court: What about the other committee?

Mr. Rickaby: I was going to say to your Honor, Mr. Arkush just spoke to you about that suggestion, and said it was done in another matter, and, well, something like that might be worked out if we had an opportunity to do it, I mean if there was an adjournment of this meeting.

The Court: Oh, I would not just have a snap election now.

Mr. Rickaby: I should like to speak to the chairman of our committee, who is not here, and talk it over with him. I do not want to speak for him without at least having an opportunity to consult with him. I want to be cooperative in the expedition of this proceeding but I certainly do not want to do anything which is going to help the confirmation of this plan, because I do not think the plan can be sustained.

The Court: What about the other committee?

Mr. Bardusch: Briefly, your Honor expressed my feelings. I should not feel it should be done now without first giving the matter serious consideration and consulting with my clients to determine whether or not

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we should join in a general committee, but I would like that right reserved.

The Court: Have you a power of attorney which will enable you to vote the claims of your client?

649

Mr. Bardusch: Our power of attorney is perhaps rather restricted. It permits us to appear by counsel in court proceedings, to be heard on all the matters in this proceeding with the same force and effect as if the creditor were here in person. There is no express statement that we may vote the claims.

Mr. Marx: I think I may be able to clear this question up. I have had it specifically in mind since this proceeding was instituted and it is my understanding that Section 338 of the Act requires that a majority of the creditors presently filing proofs of claim which are allowed, is necessary to elect a committee. In view of the fact that we have such a majority and in view of the fact that whether by reason of the statute or otherwise, we are not going to vote them, it does not seem that any committee can be elected.

650

The Court: Oh, well, I do not think that is the purpose of the act.

Mr. Arkush: May I point out that this section is subject to the provisions of the earlier chapters. As you know, the provisions of the early chapters are applicable to a certain extent to Chapter XI.

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The Court: Yes, insofar as not inconsistent with Chapter XI.

Mr. Arkush: Under Section 56-A of Chapter VI, it is provided that creditors shall pass upon claims submitted to you at the meeting by majority vote

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in number, and amount of claims of all creditors whose claims are allowed, and who are present, or as otherwise provided. It seems to me creditors who have claims but who have issued no authorizations and are not present at this meeting do not comply with this section.

Mr. Hartfield: We do not want to concede that interpretation by saying nothing about it. There are certainly present those creditors who have—

The Court: Whose proofs of claim have been allowed.

Mr. Hartfield: Certainly.

The Court: And they have been filed. So they are in the proceeding.

Mr. Rickaby: I was prepared at the proper time to argue the question your Honor suggested this morning. I do not think it makes any difference to the committee so-called, that I represent, whether you call them a committee or a group or agents or what. They have powers of attorney to appear in the proceeding and to represent, and that is borne out by the rules of the United States District Court for this district. I have in mind particularly—I do not know whether your Honor has a copy of the rules in front of you, I will hand this up—rule XI-9, which requires certain committees to do certain things, corresponding to the requirements in the statute relative to Chapter XI, where they have to file statements as to how they came into existence and one thing or another, but that applies only to a committee that accepts the plan. On the other hand, in rule VIII, as to the solicitation of proxies, the language there refers to the appointment

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of any trustee in bankruptcy or of the official creditors' committee, I mean, distinguishing that from a committee which is simply representative of a certain number of creditors.

655

The Court: Hand that up, please.

Mr. Rickaby: What your Honor referred to this morning, at least what I thought your Honor referred to, was the section of the act there indicated. There must be a clear distinction there between that and the so-called official committee.

The Court: Under that, the acceptances received by the debtor, Rule 8(a), they are all right, but there is no power of attorney that goes with them, no proxy, and that would have been barred under rule 8(a), subdivision (a) of the bankruptcy rules of this district court, Southern District of New York. Rule XI-9—it is XI(c)9, that has to do with a composition under Section 12, if you read the heading.

656

Mr. Marx: There is XI-9.

Mr. Rickaby: XI, 9. Page 98 of the book I have. That is the one I have in mind. That only applies to a committee who is attempting to accept. My committee does not come under that classification. I merely refer to that rule because it evidently, on its face, contemplates something different from a statutory committee. That is its sole relevancy, because I think it contemplates something different from the statutory committee, and I thought what your Honor probably had reference to this morning was the provisions of Section 338.

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The Court: Section 338, for the election of a committee.

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658 Mr. Rickaby: It refers to the fact that at the first meeting the creditors may appoint a committee, if none has been previously appointed under the Act, but that does not seem to be exclusive.

The Court: It seems to me that a court in a proceeding of this kind might permit the formal intervention of a committee, but we must have in mind the fact that that committee and its attorney could not receive any compensation under the decisions.

Mr. Rickaby: That might well be.

659 The Court: I have before me now an opinion of Judge Patterson, when he was sitting in the District Court, in the matter of Max Fishman, Incorporated, and the bankruptcy number of that case is 72,298, in which he so interpreted Chapter XI and subdivisions relating to committees and allowances thereunder, and in particular he referred to Section 338 and Section 337, subdivision 2, as to expenses of committees. It may be that a committee would be permitted to intervene so as to represent one particular view in respect to the amended plan, and yet it would not be the formal committee of creditors elected by the creditors at a first meeting provided for in Section 338.

Mr. Rickaby: I might say to your Honor—

660 The Court: That committee might be compensated, but the other committees, if they are permitted to intervene, may not be compensated unless there is a provision in the plan for their compensation, and Judge Coxe had a case where the situation arose, matter of Fisher Dress Corporation, and that is number 72,545 in bankruptcy in this court.

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Well, the matter of a formal election of a creditors' committee was covered by the notice, wasn't it?

Mr. Marx: No, sir.

661

The Court: Didn't your notice provide that at the said first meeting of the creditors' committee that a committee might be elected?

Mr. Marx: No, I don't think—

Mr. Hartfield: We understand that Section 338 is not a mandatory section. There is no statement that a committee must be appointed.

The Court: No, it may be.

Mr. Hartfield: And your Honor, the notice, it is my recollection of it, contained no reference to the appointment of a committee, but, as a practical matter, your Honor, it is clear that you are not called upon to exercise your discretion of whether or not there should be a statutory committee here because there isn't any majority in number that could possibly vote for the committee suggested by Mr. Arkush when the two other committees present say they are not prepared to vote, and those two have a clear majority of the vote. Even if you exclude those large number of noteholders who have agreed to accept the plan, and who have given consents, I do not see, as a practical matter, there is anything that you can pass upon.

662

Mr. Arkush: I made this suggestion, that we elect one alone. Until Mr. Rickaby and Mr. Bardusch are ready to vote, why naturally we will have to wait, because, as the Colonel says, they do control a majority in number and amount of those represented here.

663

The Court: Let us proceed.

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Arthur J. Flohr—for Debtor—Direct.

ARTHUR J. FLOHR, resumed the stand.

Direct Examination by Mr. Hartfield (Continued):

Q. Mr. Flohr, we had reached, in the consideration of the assets appearing on the balance sheet dated as of December 31, 1938, attached to the amended modification plan and arrangement, the item under the heading, unimproved real estate, \$953,213.55, less reserve for depreciation, \$2,340.03, making a net total of \$950,873.52, and it appears on your pro forma balance sheet, that is Exhibit 4, as \$290,000. Will you explain what that item consists of? A. Numbers 15-15½ Thames Street, New York City, owned free and clear and carried on the books of the debtor at \$62,524.57, its cost, less depreciation. This is a four-story brick building on a plot 38x37, and is rented to one tenant, a restaurant, at \$1320 per year. The net income for the year 1938 was \$372.64. It is assessed by the City of New York for tax purposes at \$30,000. On an income basis, this property has very little value, and the market value is probably not in excess of \$20,000. We have had no recent offers for the property.

Q. At what price do you carry this four-story brick building, 15-15½ Thames Street, on your pro forma balance sheet?

A. At \$20,000.

Q. Where does Thames Street run? A. Runs from Broadway to Greenwich Street, I believe, between 111 and 115 Broadway down to Trinity Place and directly west of that to Greenwich Street.

Q. So this property is in the block between Greenwich and

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West Broadway, isn't it? A. No, between Trinity Place and Greenwich Street.

667

Q. What is the next item on that? A. Numbers 341-359 East 49th Street, and numbers 883-891 First Avenue, New York City, carried on the books of the debtor at \$613,362.26. This property is vacant except for a six-story tenement house at 346-347 East 49th Street, New York. The debtor has entered into a contract dated June 18, 1939, for the sale of this property for \$170,000, payable \$10,000 on the signing of the contract, \$40,000 on delivery of the deed on September 1, 1939, and the balance, \$120,000, by the delivery of a purchase money mortgage at five per cent interest due on or before one year from the date of the delivery of the deed.

668

Q. Does this contract you have entered into, cover all the property or just this six-story tenement house? A. No, it covers the entire business.

Q. That is, the tenement house and the vacant property? A. Yes, sir.

Q. In making that sale, what efforts did you resort to in order to get the highest possible price? A. We have been trying to sell the property for several years, and this is the best offer we have had.

Q. Did the executive committee authorize entering into the contract? A. Yes, sir, it did.

Q. Did you participate in those discussions and conclusion to sell the property? A. Yes, sir.

669

Q. Do you say to the Court that you believe, as all your directors, that the sale was for the best interests of the company and was the highest possible price obtainable for the property? A. Yes, sir.

Q. In the pro forma balance sheet, at what price do you

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carry this item of \$613,362.26? A. Carry it at \$170,000.

Q. And that is the full purchase price to be received under the contract of sale? A. Yes.

Q. Take the next item. A. Real estate in the city of White Plains, New York, designated as lots 21 and 22, and 46 and 47, on the map of the Carhart Homestead, White Plains, Westchester County, filed with the Register of the County of Westchester, on June 16, 1902, in volume 14 of maps, page 73, owned free and clear, and carried on the books of the debtor at \$125,468.18. This property, located on the corners of Mamaroneck, Livingston and Waller avenues, in White Plains, New York, dimensions approximately 100 x 260, is rented to a tenant who has erected thereon a moving picture theatre, and the ground rental under the terms of the lease is \$2,750 net per annum to September 30, 1940, and \$3000 net per annum from October 1, 1940, to September 30, 1942. The property is assessed by the city of White Plains, for tax purposes, at \$54,000, and has been offered for sale to the lessee for \$50,000, and its current market value is probably no greater than this amount.

Q. At what price have you carried this property that was formerly carried on the balance sheet at \$125,468.18? A. On the pro forma balance sheet it is carried at \$50,000.

Q. And that is on a six per cent basis when the rent is increased on October 1, 1940, to \$3000? A. Yes, sir.

Q. Take the next item included in that. A. Real estate in the city of White Plains, New York, designated as Lots 15, 16 and 17, on the same map, owned free and clear, and carried on the books of the debtor at \$149,383.11. This property is vacant land on Mamaroneck Avenue, between Livingston and Carhart avenues, White Plains, New York, with a frontage of 150 feet and a depth of 135 feet. It is

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assessed by the city of White Plains, for tax purposes, at \$65,000, and its present market value is probably not in excess of \$50,000. It is not leased and produces no income.

673

Q. At what price have you carried this piece of property, formerly carried at \$149,383.11 on this pro forma balance sheet, Debtor's Exhibit 4? A. At \$50,000.

Q. The next item, office furniture and fixtures, the same on both balance sheets, \$1458.18, is it not? A. Yes.

Q. The next item, prepaid expenses, \$13,200.48, is carried on the pro forma balance sheet as \$20,087.53. What is your explanation of that? A. That is taxes paid in advance and unearned insurance premiums and, as a going concern, is worth that much to the company.

674

Q. Before we leave the assets aside of this pro forma balance sheet, can you summarize what is the value of the December 31, 1938 balance sheet of the unpledged property? A. Unpledged property is carried on the books of the debtor at \$18,524,761.79.

Q. What is the estimated realizable value you have on that property? A. Approximately two and a half million dollars.

Q. What has that property lately been yielding the debtor, what income? A. Approximately \$96,000 per annum.

Q. What is your estimate of what it will produce, reasonably, in the next few years? A. Probably \$60,000 per annum.

Q. Take the property which is pledged to secure that; what was the book value of that as of December 31, 1938? A. Book value of June 1, 1939, \$4,874,628.14.

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Q. What is the estimated realizable value? A. Approximately \$4,500,000.

Q. Of course, included in that is this \$4,000,000 Whitehall mortgage, is it not? A. Yes, sir.

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76 Q. And the income from that amounts to how much? A. Approximately \$270,000 per annum.

Q. Let us go to the liabilities side, and let us spend just a few minutes on that. Mr. Flohr, as I read this Debtor's Exhibit 4 for identification, you show, and have testified here today, that in your opinion the fair value of the assets of the United States Realty and Improvement Company as of June 1, 1939, was \$7,076,515.92, is that right? A. Yes, sir.

77 Q. Do you now state to the Court that that is, based upon your years of experience with this company and with your knowledge of its investments and its assets and with the amounts due to it, is the fair and reasonable value of those assets and choses in action? A. I do.

Q. Take the liabilities side. I do not think the first item needs any explanation, accounts payable and accrued taxes and interest. They are just current liabilities incurred in the usual course of business and they are either due immediately or presently will become due, isn't that right? A. Yes, sir.

Mr. Arkush: May we have that as of June 1?

Mr. Hartfield: \$74,916.59.

78 Q. Take the first item, debentures and notes payable, \$1,203,500. What are they? A. Those are fifteen-year sinking fund six per cent Gold debentures of G. A. F. Realty Corporation, dated January 1, 1929, and due January 1, 1944, guaranteed by the United States Realty and Improvement Company as to principal, interest and sinking fund payments.

Q. What was the total amount of those outstanding originally? What is the amount now outstanding, as distinguished from those held in the treasury? That is a better way to put it? A. There are outstanding now \$2,162,500 principal amount of these debentures.

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Q. How many gold debentures are held in the treasury?

A. \$959,000 principal amount.

679

Q. That leaves outstanding in the public \$1,203,500? A. Yes.

Q. What is the next item appearing on the liabilities side?

A. Six per cent sinking fund debentures due January 1, 1944, of United States Realty & Improvement Company, of which there are outstanding \$1,187,000 principal amount, and of which \$51,500 principal amount are held in the treasury of the debtor.

Q. As I understand it, they are the unconditional obligations of the United States Realty & Improvement Company which mature January 1, 1944, and are outstanding in addition to those held in the treasury in the sum of \$1,135,500? A. Yes.

680

Q. Has the company regularly paid the interest due upon those outstanding debentures? A. Yes.

Q. Are they secured in any manner? A. They are secured by the pledge of this—

Mr. Rickaby: I do not want to object, your Honor, but I think the documents relative to those debentures, that is, the trust indenture, and the pledge agreement, should be put in evidence.

The Court: You may inquire as to that on cross examination.

681

A. (Continuing) They are secured by the deposit of voting trust certificates representing 8576 shares of Class B Common stock of the Fuller Building Corporation.

Q. The next item is what on the liabilities side? A. Note payable, at 4 per cent per annum, due August 12, 1939, to the National City Bank for \$3,000,000.

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Q. And that is the note that you told us about this morning, secured by the \$4,000,000 Whitehall mortgage? A. Yes.

Q. And interest has been regularly paid to the National City Bank on that note? A. Yes.

Q. What is the next item of \$137,500? A. It is a note payable to the Manufacturers Trust Company, due \$37,500 on November 30, 1939, and \$37,500 quarterly thereafter until August 30, 1940, when the balance becomes due.

Q. Is that the \$137,500 you told us about this morning, remaining of the original \$550,000 of indebtedness? A. Well, this is—yes, sir.

Q. What is the total amount of these obligations of the U. S. Realty & Improvement Company outstanding? A. \$5,476,500.

Q. Do these liabilities which you told us about include, or are they exclusive of the contingent liabilities of this U. S. Realty & Improvement Company? A. They are exclusive of contingent liabilities.

Q. Have you annexed to this pro forma balance sheet, Debtor's Exhibit 4 for identification, a list of the contingent liabilities of the company? A. Yes, sir.

Q. Will you briefly state what those contingent liabilities of the company are? A. One is the guarantee of principal, interest and sinking fund payments on the first mortgage 20-year 5½ per cent sinking fund gold loan certificates, dated June 1, 1919, of Trinity Buildings Corporation of New York. \$3,710,500 principal amount of these certificates and interest of \$102,038.75 were unpaid at June 1, 1939.

Endorsement of the note payable for \$50,000, due \$25,000 July 30, 1939, and \$25,000 on August 30, 1939, of Plaza Operating Company, which note has since been paid.

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Proposed deficiency in Federal income taxes for 1933 which is being contested—approximately \$45,000. The company's Federal income tax returns for the years 1935 to 1938 inclusive are subject to review by the United States Treasury Department.

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A proposed assessment of intangible personal property taxes by the city of Jersey City, New Jersey, for the years 1937 and 1938 in an indeterminate amount.

Q. With the exception of ordinary litigation, the ordinary causes for personal injury, does that contain a statement of the contingent claims as you know them. A. Contingent liabilities, yes.

Q. Contingent liabilities, I should say. Having excluded altogether contingent liabilities, and considering the \$18,000,000 of capital stock shown on your balance sheet, how much of a deficit exists? A. On the basis of the estimates that I have placed in making up this pro forma balance sheet, a deficit of \$16,474,900.67 exists exclusive of any contingent liabilities.

680

Mr. Hartfield: We now offer in evidence, if your Honor please, Debtor's Exhibit 4 for identification, being the pro forma balance sheet prepared by this witness under the circumstances testified by him.

Mr. Rickaby: No objection.

687

The Court: Received.

(Debtor's Exhibit 4 for identification received in evidence.)

Q. On the indebtedness which the company owes, exclusive, you know, of this mortgage guarantee of the Trinity

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Arthur J. Flohr—for Debtor—Direct.

Buildings Corporation, how much interest is the company required to pay a year? A. Approximately \$267,500.

Q. Have you made any estimate of what the sinking fund requirements of the company will have to be on this indebtedness within the next three years? A. I estimate that sinking fund requirements on this indebtedness will necessitate the expenditure of approximately \$75,000 within the next three years.

Q. Mr. Flohr, will you tell the Court whether or not the debtor is at this time able to meet its guarantee of the share certificates on the First Mortgage alone of the Trinity Buildings Corporation, and give the reasons for your answer. A. The debtor is unable to meet its guarantee of the share-certificates at the present time, since it hasn't sufficient cash and since it is not in a position to liquidate and realize upon its investments without serious loss to other creditors and, incidentally, to its stockholders.

Q. If that is so, why does the debtor make this arrangement offer? A. I do not quite understand that.

Q. I mean, what is the debtor's hope in connection with this situation in making this arrangement offer to give a new guarantee on the outstanding obligations of the Trinity Buildings Corporation? A. Well, we believe that within the next three years we will have sufficient cash and sufficient earnings to meet the new guarantee of interest on the First Mortgage loan, and I also believe that within ten years we will be able to, or will be able to cause the Trinity Buildings Corporation to pay off the loan in its entirety or to refund the same.

Q. When you say refund, you mean that you will reduce the mortgage to such amount that you can be able to obtain

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a new loan to take it up from some other source? A. Either to reduce it or to get it for its full amount, if business gets a little better.

Q. You gave us the other day figures with respect to the income from these two buildings, but, as I remember it, when you testified on June 28th you said there had been paid in excess of \$11,000,000 to the U. S. Realty & Improvement Company as interest on its notes for \$8,871,000. Did I understand your testimony to mean that you had actually paid this amount in cash? A. I didn't mean that. I meant that in excess of eleven million dollars, to be exact \$11,228,949.35, had been accrued to December 1, 1932 as interest on the note of the United States Realty & Improvement Company, and had been credited to its open account and charged to interest expense on the books of the Trinity Buildings Corporation of New York.

Q. What I want to know is, was all this money actually paid in cash to the United States Realty & Improvement Company prior to December 1, 1932? A. No, there was still due the United States Realty & Improvement Company on December 1, 1932, \$1,738,962.44 on open account, so that the net amount actually paid to United States Realty & Improvement Company prior to December 1, 1932, was \$9,489,986.91.

Q. Has anything been paid to the United States Realty & Improvement Company since December 1, 1932? A. Yes, up to December 1, 1934, there were debits and credits to the open account of the United States Realty & Improvement Company which resulted in a net debit to the account or payment to the United States Realty & Improvement Company of \$184,127.95, thereby reducing the balance on open account

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Arthur J. Flohr—for Debtor—Direct.

at December 1, 1934, to \$1,554,834.44. From December 1, 1934, to December 31, 1938, there were net credits to the open account or payments by the United States Realty & Improvement Company to Trinity Buildings Corporation of New York of \$106,456.06, making the balance on open account at December 31, 1938, \$1,661,290.55, and making the amount of interest actually paid to the United States Realty & Improvement Company over the term of the mortgage, \$9,567,658.80.

Q. For how many years has interest been paid on the First Mortgage of the Trinity Buildings Corporation of New York?

A. For nineteen and a half years, to December 1, 1938.

Q. At what rate of interest? A. $5\frac{1}{2}$ per cent.

Q. What was the net amount of interest actually paid to the United States Realty & Improvement Company by the Trinity Buildings Corporation of New York on its notes? What was the average rate of interest over the same nineteen and a half years? A. An average of slightly in excess of $5\frac{1}{2}$ per cent, to be exact 5.59 per cent.

Q. Did the United States Realty & Improvement Company have any investment in the Trinity Buildings Corporation in addition to the note that you have told us about of some nine million dollars plus? A. Yes, sir, it had an interest of a million dollars in the capital stock of the Trinity Buildings Corporation.

Q. When you say it had an investment, do you mean a cash investment of a million dollars? A. It was property, I would say, at the time of the conveyance, conveyance of a property from Trinity Buildings to the United States Realty, or, rather, from the United States Realty to Trinity in 1919.

Q. And that represented the fair value of what was paid in for the capital stock of the company? A. Yes, sir.

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Arthur J. Flohr—for Debtor—Direct.

Q. If you add this million-dollar investment in the capital stock, what was the total investment of United States Realty & Improvement Company in Trinity Buildings Corporation?
 A. \$9,781,192.44.

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Q. During this 19½ year period what was the average return that the United States Realty & Improvement Company had upon its investment of \$9,781,000 plus? A. An average of slightly in excess of five per cent per annum, to be exact 5.02 per cent.

Q. Have you prepared, Mr. Flohr, a statement showing the cash balance of the debtor as of the close of business May 31, 1939, and your estimated cash receipts and disbursements for the period June 1, 1938, to December 31, 1941?
 A. June 1, 1939, to December 31, 1941?

698

Q. Yes. Is the paper which I now show you this statement so prepared by you or under your supervision? A. Yes, sir.

Q. And is that in your opinion a correct statement both of the cash on hand and your estimate of the cash receipts and disbursements for the period June 1, 1939, to December 31, 1941? A. That is, to the best of my ability.

Q. Correct? A. Correct, yes.

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Mr. Hartfield: I offer this in evidence. I will give copies of it to the gentlemen to whom I gave copies the last time.

(Marked Debtor's Exhibit '6 in evidence.)

Mr. Rickaby: That is simply his own judgment?
 Mr. Hartfield: Yes.

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Arthur J. Flohr—for Debtor—Direct.

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The Witness: I would like to qualify that, Colonel, if I might, by saying that it does not provide for any of the expenses of this proceeding.

Q. And to the extent that any of the expenses of the proceeding have to be paid by U. S. Realty & Improvement Company, your estimate of the cash position will be reduced?

A. Yes, sir.

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Q. I asked you a minute ago, and you told us that no dividends of any kind were paid by the Trinity Buildings Corporation to the U. S. Realty & Improvement Company during the period in question. Were any other sums received other than these payments of interest, which were shown on the books of your company, did you receive indirectly any sums in lieu of dividends or otherwise? A. No, sir.

Q. Did the Realty Company pay rent to the Trinity Buildings Corporation during this period for the space it occupied there? A. Yes.

Q. And I want to know, did it get the rent at less than the market price, or did it pay the full market rate for the space occupied? A. Always at the market price.

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Q. Have you any idea of what the aggregate of rent paid by the U. S. Realty to the Trinity Buildings Corporation was during that period? A. It was approximately \$338,000.

Q. Mr. Flohr, when it came to the time to prepare this plan and modification of the plan, could you tell us how the original plan was first prepared? A. On December 4, 1936, after the income of Trinity Buildings Corporation of New York from the mortgaged premises had fallen below its interest requirements, counsel was consulted and both Trinity

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Buildings Corporation of New York and the debtor were advised that under the mortgage moratorium statutes of the State of New York they were not required to make sinking fund payments so long as interest and taxes were met. Thereafter, on the advice of counsel, sinking fund payments were discontinued, and payments aggregating \$647,144.32 have been postponed under the terms of the mortgage and under the provisions of the New York State mortgage moratorium law.

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In June of 1938 the debtor and Trinity Buildings Corporation of New York again consulted counsel with respect to the impending maturity of Trinity Buildings Corporation of New York First Mortgage Loan and the guarantee thereof by the debtor. Numerous conferences and plans and methods for reorganizing or refunding the mortgage loans were considered. Attempts had previously been made without success to secure a new first mortgage loan sufficient to enable Trinity Buildings Corporation of New York and the debtor to pay off the present loan. Thereafter, counsel conferred with the Reconstruction Finance Corporation concerning the possibility of its making such a loan, but without avail.

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Some time in September 1938 counsel proposed a method of extension and modification under Chapter XI of the Bankruptcy Act and under the Burchill Act, which resulted in the present amended modification plan and arrangement. Numerous conferences were had with counsel and the matter was discussed among the officers and directors of the debtor and of Trinity Buildings Corporation of New York. Thereafter drafts of the plan were studied, discussed and revised. On the advice of counsel, said drafts were presented both to Guaranty Trust Company of New York in its

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capacity as mortgagee, and to the National City Company as the underwriter of the securities back in the year 1919 and to their respective counsel. Changes were made in the arrangement as suggested by both such parties and their counsel and finally, after the original plan was approved by the board of directors on March 15, 1939, it was promulgated, a copy thereof, of a combined form of proof of claim and acceptance, and a letter to certificateholders, dated March 15, 1939, being mailed to all known holders of share-certificates.

Q. Did something happen following the mailing of the modification, of the modified plan and agreement, dated March 15, 1939? I am talking now about the amended plan.

A. Yes, thereafter the officers—

Q. I want you to go to your memorandum IX. A. Immediately following the mailing of the modification plan and arrangement dated March 15, 1939, to all known holders of share certificates, the debtor communicated with the large holders of share certificates, among which were the following—

Mr. Rickaby: Just a moment. Your Honor, I do not see what that has to do with the fairness of the plan. I believe this witness is about to read a prepared statement, that he communicated with various banks and trust companies and asked for their consideration, and as a result evolved this plan. I do not think that has anything to do with the matter.

Mr. Hartfield: It has, to show that the amended plan was the result of conferences with and consultations with important holders of these share-certificates. That is what we want to show.

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The Court: You would want to show that, certainly.

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Mr. Hartfield: Yes, that is all.

The Court: Counsel does not want the witness to read from any prepared statement.

Mr. Hartfield: But he certainly has to refresh his recollection as to the list of those people he communicated with, and he must use the statement for that purpose only.

Mr. Rickaby: My point is, if he communicated with ninety per cent and they accepted it, but it was not accepted by the other ten per cent, it cannot be approved.

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The Court: Was it fair in its origin? That is the thought I think in back of the offer of the testimony. Whether or not any modifications were made at the suggestion of any large holders of Share Certificates is the purpose.

Mr. Hartfield: Yes, that is right, your Honor.

The Court: And then I suppose you will show what those modifications were, is that it?

Mr. Hartfield: Yes, sir. And the Circuit Court of Appeals, you know, has stated that the acceptance of the plan by the parties interested is strong evidence of its fairness, and we want to show not only was there acceptance but there were changes in the terms.

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The Court: I will permit him to show what happened after the circularization.

Mr. Rickaby: We had ninety per cent in the Barclay case in the Second Circuit.

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Mr. Hartfield: That is quite different there.

The Court: In that case there was some provision in the reorganization of the corporation itself, a provision under which the stockholders got something, and I believe that the record indicated there wasn't any equity or anything that represented the stock, anything of value.

Mr. Hartfield: And the point is, the creditors were getting less than a hundred cents, and they were giving something to the stockholders, none of which is present here.

The Court: The bonds were being reduced, I believe, as well as interest.

Mr. Rickaby: They got preferred stock in place of the bonds, but the stockholders had some stock which was concededly worth nothing.

The Court: I will have you brief that. I will take this in the meantime, to show the origin of the plan and how it was that amendments to the plan were made, what prompted those amendments, the source or the group who made the suggestion, and then we will have the whole picture, because one of the things the Court must determine is whether or not the plan is fair and equitable, and I think it may have a bearing on that point, if it is shown how the plan was evolved and how amendments to the plan were made.

Mr. Rickaby: Your Honor, just for the purposes of preserving the record, I object, and may I have an exception?

The Court: Yes. Proceed.

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A. (Continuing). Among the large holders of share certificates communicated with were the Savings Bank of Baltimore, with \$300,000 principal amount;

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Guaranty Trust Company of New York, either as Trustee for various personal trusts, or as Agent,	\$191,000;	
The President and Fellows of Harvard College,	\$122,000;	
Investors' Syndicate	\$101,000;	
Paterson Savings Institution	\$100,000;	
Reliance Insurance Company	\$100,000;	
Equitable Life Assurance Society	\$ 99,000;	
Carnegie Foundation for the Advancement of Teaching—	\$ 98,000;	716
United States Trust Co. of N. Y. (either as Trustee for various personal trusts, or as Agent)	\$ 51,000;	
City Bank Farmers Trust Co. (either as Trustee for various personal trusts, or as Agent)	\$50,000;	
Columbian Life Insurance Co., Boston	\$50,000;	
New York Foundation	\$40,000;	
National Commercial Bank & Trust Co. Albany (either as Trustee for various personal trusts, or as Agent)	\$40,000;	
Fidelity-Phenix Fire Insurance Co.	\$25,000;	717
Continental Insurance Co.,	\$25,000;	
Artisans' Savings Bank, Wilmington, Del.	\$25,000;	
Wilmington Trust Co., Wilmington, Del. (either as Trustee for various personal trusts, or as Agent)	\$25,000;	
Markle Banking & Trust Co., Hazelton, Pa.	\$25,000;	

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Camden Fire Insurance Co., Camden, N. J.,	\$25,000;
Northwestern Insurance Co., Milwaukee,	\$25,000;
Fulton Trust Co., N. Y. City (as Trustee for personal trusts)	\$25,000;
Great American Fire Insurance Co.	\$23,000;
Schuylkill Trust Co., Pottsville, Pa.	\$20,000.

After several telephone conversations and one personal talk with Mr. Austin McLanahan, president of the Savings Bank of Baltimore, during which it was explained to Mr. McLanahan that the various institutions all appeared to have different suggestions for constructive changes in the Plan, we were advised by Mr. McLanahan that he had written personal letters to representatives of each of the above named institutions as well as to several others, suggesting that a meeting be held at the office of the Guaranty Trust Company of New York, at which only representatives of the institutions would be present, and at which the various suggestions could be crystallized and submitted to the Company. We were advised that such meeting was held in the morning of April 21, 1939, and thereafter Mr. Beinecke, president of the U. S. Realty & Improvement Company; F. M. Sanders, executive vice-president of the U. S. Realty & Improvement Company, and I were invited to meet such representatives and receive their suggestions. The invitation was accepted and the suggestions received and considered, and as these suggestions appeared to the Board of Directors of the Realty Company as well as to the Board of Directors of Trinity Buildings Corporation to be fair and equitable and feasible, they were accepted, and, under date of May 1, 1939 an Amended Modification Plan and Arrangement was mailed all known holders of Share Certificates.

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Q. Is this Amended Modification Plan and Arrangement the paper dated May 1, 1939, to which I have referred heretofore, and which is the Amended Modification Plan and Arrangement which this Court is asked to approve in this present proceeding? A. Yes.

Q. Is the letter which accompanied that amended modification plan, the letter dated May 6, 1939, which I now show you, being a letter from the President of the Triptity Buildings Corporation, addressed to the Share Certificate holders? A. Yes, sir, this is the letter that accompanied it.

Q. Does that letter summarize the changes in the original plan which resulted from that meeting held at the office of the Guaranty Trust Company, called by Mr. McLanahan, the President of this Savings Bank of Baltimore? A. Yes, sir.

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Q. Can you very briefly summarize the changes that were made in the original plan at the request of Mr. McLanahan and as a result of that meeting held with the representatives of these large holders of Share Certificates? A. Yes, sir. The fixed interest was increased from $2\frac{1}{2}\%$ to 3% and the contingent interest, or interest if earned, and payable at maturity, was changed from $2\frac{1}{2}\%$ to 1% per annum until July 1, 1944, and from $2\frac{1}{2}\%$ to 2% thereafter until maturity.

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The maturity of the obligation was extended for ten years and one month instead of for twenty years and one month.

The redemption and sinking fund paragraph was amended to provide in lieu of a sinking fund of two-thirds of all available net earnings after payment of deposit in the Im-

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provement Fund and additional interest in substance as follows: Until the principal amount of the obligation is reduced to \$2,500,000 all available net earnings after deposit in the Improvement Fund and payment of additional interest are to be used for the retirement of share certificates or new bonds provided that the net current assets or cash of the Company shall not be decreased below \$50,000. In addition, no dividends are to be paid by the new company until the principal amount of the obligation shall have been reduced to \$2,500,000 and thereafter no dividends shall be paid in excess of amounts used for retirement of bonds and in no event in excess of \$50,000 per annum.

Q. And that is the guarantee which is now annexed to the amended modification plan and agreement, being the form which appears following page 15 of this paper, is it not? A. Yes.

Q. And that is the guarantee, or form of the guarantee which you agreed upon with these representatives of these large holders of the outstanding share certificates? A. Yes, sir.

Q. What other change was made?

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The Court: Suppose you let us know what that guarantee is. After all, this proceeding centers around that doesn't it? What is the new guarantee in place of the old?

Mr. Hartfield: Leaving out the recitals, the guarantee is that "Realty for itself, its successors and assigns, does hereby unconditionally guarantee to Guaranty Trust Company of New York, as mortgagee aforesaid, its successors and assigns, and to the holders and registered owners from time to time

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of certificates for shares in the aforesaid First Mortgage loan, the due and punctual payment by Trinity Buildings Corporation of New York of (a) the principal of such loan with a maturity of July 1, 1949, as and when the same shall become due and payable whether at such maturity or by declaration under the terms of the obligation as modified under the aforesaid amended modification plan and arrangement; (b) interest on such First Mortgage loan at the rate of 3% per annum commencing December 1, 1938, and payable on July 1, 1939 and semi-annually thereafter; (c) additional interest in an amount equivalent to the sum of 1% per annum for the period December 1, 1938 until July 1, 1944, and of 2% per annum for the period July 1, 1944 until July 1, 1949, of outstanding certificates for shares and payable on July 1, 1949, to the extent not theretofore paid."

We have put the guarantee in as simple and plain terms as we could ourselves devise, and which were satisfactory to the representatives of these large holders of share certificates.

Q. Will you go ahead with other modification? A. The provision for amendment of the new guarantee or the new indenture by written consent of holders of 66⅔ per cent of outstanding obligations was limited by a provision that no modification could be made if holders of 20 per cent or more should dissent in writing therefrom.

Expenses: the debtor agreed to reimburse Trinity for its expenses up to, but not exceeding \$25,000 in respect of the Burchill Act reorganization.

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Q. After you had agreed with these representatives of the large holders of outstanding share certificates to those changes, they were incorporated in the amended modified plan and were circulated to the share certificate holders?

A. Yes, sir.

Q. After you sent out the plan, did you agree to certain interpretations and the relinquishment of reserved rights by three certain letters, which I now show you, one a letter of the Trinity Buildings Corporation, and the United States Realty & Improvement Company, dated May 29, 1939, addressed to the Guaranty Trust Company, of New York, not as mortgagee but in its individual capacity as a bondholder? Did you, on behalf of the Trinity Buildings Corporation and United States Realty and Improvement Company, cause that letter to be delivered? A. Yes, sir.

Mr. Hartfield: I offer in evidence that letter.

The Court: Summarize it first.

Mr. Hartfield: We forego the right, Your Honor, under the Burchill Act, to have the upset price, to be fixed for the sale of the property, fixed if anything in excess of the amount due on the mortgage and interest. In other words, if anybody will come in on that Burchill reorganization plan and bid more than the amount due on mortgage and interest, we are not permitted to bid anything more. We forego the right to bid anything in excess of that sum.

The Court: What is the date of that letter?

Mr. Hartfield: May 29, 1939.

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Mr. Rickaby: I call your Honor's attention to the fact that that is practically a concession that there is no equity there.

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The Court: No, I think that meets one of the objections I read some place in the papers that were submitted to me, I think on the application to intervene, that one group of certificate holders represented by a committee object on the ground that it might be possible in the Burchill Act Proceeding to set an upset price that would be so high that it would exclude a bid that would take care of certificate holders and let them out.

Mr. Bardusch: That was one of the objections raised by our committee initially early in May.

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The Court: All right; this letter is May 29, 1939?

Mr. Hartfield: May 29, 1939.

The Court: That was intended then to meet your objection.

Mr. Arkush: We also have the same qualification, your Honor.

The Court: You make the same objection?

Mr. Arkush: On that same point.

The Court: Apparently they have agreed to an amendment. They have gone on record that it is not their purpose to ask that an upset price in excess of the amount due for principal and interest on the mortgage be fixed in the Burchill Act proceeding. If formal amendment to the plan is thought necessary, they are prepared to have that amendment.

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Mr. Hartfield: I do not think it is necessary and,

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of course, the reason it was put in was that the United States Realty & Improvement Company is a creditor and someone might say "you could use your claim for that purpose," and that provision is to avoid that. What we have done is to file this paper as an interpretation of what we understand that agreement to mean, so as to obviate the objections that were made.

Mr. Rickaby: When we are talking about upset prices, there is a great distinction between an upset price under the Burchill Act and an upset price in Federal procedure.

The Court: Upset price represented by the principal plus unpaid interest on the certificates is the upset price.

Mr. Rickaby: I appreciate that, your Honor, but I am calling your Honor's attention to the fact that the section of the Real Property Law, commonly known as the Burchill Act, requires the Court to fix a minimum price and a maximum price.

The Court: Yes.

Mr. Rickaby: And there is no chance in the world, in a Burchill Act proceeding, of the Court fixing a higher price for the trustee to bid than full principal and interest.

The Court: Or for anybody to bid.

Mr. Rickaby: Yes, sir.

The Court: Then there wasn't anything to the objection.

Mr. Rickaby: I did not make the objection.

Mr. Hartfield: But if there was anything to the objection, it has been met.

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Mr. Arkush: Just to keep the record clear, whether what the Court would find in the Burchill Act proceeding might have been influenced is the very fact that the plan specifically reserves to Realty the right to increase the maximum amount of the upset bid by its interest to ten million dollars.

739

Mr. Hartfield: That is an incorrect statement. The plan reserves the right to apply to the Court in the Burchill proceeding to raise the upset price.

Mr. Arkush: That is right. It seems to me, I haven't had Mr. Rickaby's experience in court, if the court had been told that a large amount in number and amount consented to this reservation, the court would have fixed a higher amount.

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Mr. Rickaby: If they could have raised more they would have paid the bonds.

The Court: I must take a practical view of the whole thing, and I suppose the bondholders would like to be paid the amount of their bonds, too.

Mr. Rickaby: Very much.

The Court: And the interest, even though in the present money market they cannot get $5\frac{1}{2}\%$ on their money.

Is there any three per cent money downtown which is secured?

741

Mr. Hartfield: If it is well secured, the borrower can write his own ticket.

The Court: At any rate, the letter was written for the purpose of meeting the objection made by one of the committees.

Mr. Hartfield: Yes.

(Marked Debtor's Exhibit 7 in evidence.)

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Mr. Hartfield: I now offer in evidence a letter dated May 2nd, 1939, addressed by the President of the U. S. Realty & Improvement Company to Mr. Austin McLanahan, The Savings Bank of Baltimore, and the substance of that letter is, I submit, that it is intended that holders of the share-certificates should have representation both on the board of directors of the U. S. Realty & Improvement Company and of the Trinity Buildings Corporation, but that as nobody had been designated to represent the certificates, they would not be included in the amended modification plan and agreement, but that the company committed itself that there should be representation of the share-certificate holders on the boards of both the Realty & Improvement Company and the Trinity Buildings Corporation, and I offer this in evidence as an exhibit.

(Marked Debtor's Exhibit 8 in evidence.)

Mr. Hartfield: We now offer in evidence a letter dated May 22, 1939, signed by the Trinity Buildings Corporation of New York, by its president, addressed to Paterson Savings Institution of Paterson, New Jersey, to the effect that the corporation will request the Supreme Court in the State Burchill Act proceeding, when that Court approves the form of the First Mortgage Indenture, to have it contain a provision to the effect that any moneys that are on deposit for the so-called improvement fund, which the amended plan provides for, shall not be used to pay fixed interest without the consent of the corporate trustee

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under the new mortgage to be given in the Burchill
Act proceeding.

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(Marked Debtor's Exhibit 9 in evidence.)

The Court: Explain the effect of that.

Mr. Hartfield: This plan provides that there shall be set aside to pay interest a certain amount to make improvements in the building, because improvements are necessary, and a particular fund is necessary to make tenant changes, where he requires different partitions and different spacing of the offices, depending on whether it is a bank or law office. In order to meet tenants' needs, everybody agrees it is highly desirable there should be this improvement fund. One of the holders of one of these certificates has had the idea that later we might go on for six months' time and not need the fund and then try to pay the obligations under these bonds. This is an agreement that this fund shall not be used to pay fixed interest without getting the consent of the corporate trustee under the mortgage. To assure that this money won't be used for any other purpose other than as outlined, this certificate holder thought it desirable and necessary to make this provision.

746

The Court: So the guarantor would not have the benefit of it.

Mr. Hartfield: That is right.

The Court: Indirectly on a guarantee.

Mr. Hartfield: Yes, sir.

The Court: That is what it amounts to. So the

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money would have to be used for that purpose, and you would have to make good the difference, if any difference existed, in order to pay the three per cent.

Mr. Hartfield: Fixed interest which we unconditionally guarantee.

The Court: And the only circumstances under which any part of the \$50,000 could be used to pay interest would be with the approval of the corporate trustee.

Mr. Hartfield: Under the mortgage. I am told that I was wrong in saying that included in these capital changes and improvements that this money was used for tenant partitions. That is treated as an operating expense. It means permanent improvements, such as elevators and stairs, you know, permanent parts of the building, not tenant changes. I would like to correct my statement to that extent.

The Court: And your plan so indicates?

Mr. Hartfield: That is what tenant changes are, treated as an operating expense.

The Court: Not ordinary wear or upkeep.

Mr. Hartfield: Yes.

Q: Have you produced the annual reports of the United States Realty and Improvement Company for the years 1930 to 1938, both inclusive? A. Yes, sir.

Q: And they are the reports which were regularly mailed to stockholders of the U. S. Realty & Improvement Company at the end of each fiscal year? A. Yes.

Mr. Hartfield: I offer as one exhibit these reports covering the years 1930 to 1938, both inclusive.

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(Nine pamphlets marked Debtor's Exhibit 10.)

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Mr. Hartfield: The witness is subject to cross
examination.

* * *

Cross Examination by Mr. Bardusch:

Q Mr. Flohr, you testified that there were outstanding, I
believe the figure was, \$1,203,500 of G.A.F. Realty 6% Deben-
ture Bonds, did you not? A. Yes, sir.

Q. Was the G.A.F. Realty reorganized a few years ago?
A. Yes, sir.

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Q. Under section 77B? A. Yes, sir.

Q. And previous to that reorganization these bonds had
been guaranteed by the United States Realty & Improvement
Company, if I understand correctly? A. Yes.

Q. Under the plan of that reorganization, were they ex-
changeable for any other type of debenture bond? A. Yes.

Q. What is the name of that other bond for which they are
exchangeable? A. Six per cent Sinking Fund Debentures
due January 1, 1944 of the United States Realty & Improve-
ment Company.

Q. When were they created? A. I cannot tell you the exact
date.

753

Q. Were they created on or about July 1, 1935? A. (No
answer.)

Q. Well, I show you—you are familiar with the records
of the Realty Company, are you not? A. Oh, yes.

Q. I will show you that and ask you if that is not a copy of
the instrument creating the debenture bonds? A. Yes sir,

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that is a copy. This was created—the trust agreement is dated as of July 1, 1935, but I believe it was created some six months later than that.

Q. That is at least its date? A. Yes.

Mr. Bardusch: I offer in evidence a copy of the indenture of the United States Realty & Improvement Company with the National City Bank of New York as trustee, dated as of July 1, 1935, under which were created \$2,662,500 principal amount 6% Sinking Fund Debentures dated as of July 1, 1935, and maturing January 1, 1944.

Mr. Hartfield: I suppose you will stipulate that it is under that indenture that there are now outstanding \$1,135,500, which appears on this Debtor's Exhibit 4?

Mr. Bardusch: Yes, I shan't challenge the amount outstanding.

Mr. Hartfield: I just wanted to connect the two.

The Court: I have concluded, in view of the different viewpoints of the various committees, creditors' committees, that the best thing for me to do would be to permit you to intervene.

That rule you mentioned, counselor, would indicate that under Rule XI, subdivision 9, it was contemplated that committees might file proofs of claim.

Have you the exact wording of it?

Mr. Rickaby: Yes, your Honor.

The Court: May I have it, please.

Mr. Marx: Rule XI-9 refers only to where the committee wishes to accept the plan, I believe.

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The Court: Yes, desire to file acceptance to an arrangement. 757

Mr. Marx: Yes.

The Court: Well, they might file an acceptance to a proper arrangement.

Mr. Rickaby: It contemplates the existence of an unofficial committee which may be favorable. If it contemplates one favorable, it must naturally follow there must be an unfavorable one.

Mr. Hartfield: Can there be any doubt that an absolute condition requisite to making this Rule XI-9 applicable is that it is a committee or person representing more than twelve creditors who desire to file acceptances to an arrangement? These committees here do not desire to file acceptances to an arrangement. They are here, at least two of the committees, for the purpose of opposing the acceptance of an arrangement. 758

The Court: I do not know that they are here to oppose the acceptance of any arrangement.

Mr. Bardusch: No, we are not. 

The Court: They may be willing to agree to what they consider a proper arrangement.

Mr. Hartfield: But, your Honor, I do not really care so much. I want you to let these people be heard. I did not object so much to the intervention— 759

The Court: You did not object when the motions were returnable.

Mr. Hartfield: Therefore I do not want to be heard now, but I don't want you to put it on what I conceive to be an improper ground, which is Rule XI-9.

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The Court: On what ground did you not oppose their application for intervention?

Mr. Hartfield: Simply on the general ground that in a proceeding of this kind if the Court were satisfied that the committees were acting in good faith—

The Court: I think they are.

Mr. Hartfield: And I have not suggested that they are not, that the Court would like to hear from any party, you know, just so long as there wasn't too much of a duplication. We want everybody to be heard. Therefore we did not object to the application for intervention, but it seems to me I should not sit by and let you put it on that rule when I am sure it has no application to this situation.

The Court: In view of the difficulty of electing a committee at this first meeting of creditors, and we have had that shown in the discussion that took place this afternoon, I think the best way to give every committee a standing would be to permit the intervention.

Mr. Bardusch: I have offered this in evidence. I ask that it be marked.

(Marked Earl Committee Exhibit A.)

Q. You are familiar with this indenture, are you not?

A. Yes.

Q. Under the terms of that there isn't any collateral security? I mean, you remember that, don't you? You are an officer. That is knowledge of all—

The Court: Just let him answer one question at a time.

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Q. (Continuing) Under that instrument? A. I am afraid I could not answer that question directly. You know what is in this; I don't know; I know that there is collateral security but whether it is mentioned in there or not, I can not answer.

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The Court: Suppose you answer this; when was the collateral put up?

Mr. Bardusch: I am coming to that, if your Honor please. I beg your pardon.

The Court: When was the collateral put up?

The Witness: The collateral was put up at the time of the reorganization of the G.A.F. Realty Corporation and I believe was put up at the instance of the court that had jurisdiction at that time.

764

Mr. Marx: I am familiar with that proceeding, and I will straighten the witness out, if Mr. Bardusch will permit.

The Court: Yes.

Mr. Marx: The plan of reorganization provided at the time that the 6% Debentures of G.A.F. Realty Corporation, guaranteed by United States Realty & Improvement Company, should be exchangeable for debentures with identical terms of United States Realty & Improvement Company. To secure all those debentures, those that were not exchanged, and those that were exchanged, the stock was put up. Therefore a separate pledge agreement was drawn up at the same time so that both indenture issues, which would only be outstanding in the same amount, because, as they were exchanged, one of the issues

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would be increased and the other decreased. Therefore the separate pledge agreement was simultaneously executed to secure both issues.

The Court: Did the plan of reorganization so provide?

Mr. Marx: Yes.

Mr. Rickaby: May I inquire, your Honor, whether it was compulsory on the holders of the debentures of the G.A.F.—

Mr. Marx: No.

Mr. Rickaby: To exchange, or could they keep the old ones and at their option exchange?

Mr. Marx: Yes.

The Court: But there was a separate pledge agreement?

Mr. Marx: Yes.

The Court: Although the debenture as issued did not provide for security as part of the reorganization?

Mr. Marx: The plan provided for security.

The Court: And the pledge agreement?

Mr. Marx: Was approved by the court.

The Court: Have you a copy of that?

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Mr. Bardusch: I offer in evidence agreement of pledge, dated February 10, 1936, between U. S. Realty & Improvement Company and the National City Bank of New York.

(Marked Earl Committee Exhibit B.)

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The Court: What I wanted to have explained to me, in view of the objections made in some of your circulars or in the applications for leave to intervene, was whether or not the deposit of this security was something done with an eye to this proceeding, to make one who otherwise would have been an unsecured creditor, and therefore entitled to file proof of claim and vote, a secured creditor. Apparently this pledge agreement removes that doubt, because that was something that was in the dark recesses of my mind, where suspicion sometimes lingers, but that suspicion has found a place of habitation; a home, and I am glad to see it has been dispossessed from the dark recesses. Go ahead.

Q. Mr. Flohr, it was under this pledge agreement, just referred to and introduced in evidence as Earl Committee's Exhibit B, that 8000-odd shares, 8576 shares of the Class B Common stock of the Fuller Building Corporation, were pledged as— A. I believe there were voting trust certificates representing that stock pledged.

Q. That was the same. Voting trust certificates for 8576 shares of Class B Common stock of the Fuller Building Corporation? A. That is right.

Q. Was the collateral that was placed back of this debenture bond issue? A. Right.

Q. That is also the same collateral that, under that plan of reorganization, is available for the G. A. F., that is what you called it, debenture bond issue outstanding, is that right? A. Right.

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Mr. Bardusch: I offer in evidence trust agreement dated as of January 1, 1929, between G. A. F. Realty Corporation and the National City Bank of New York, as trustee, providing for \$3,000,000 15-year Sinking Fund 6% Gold Debentures.

(Marked Earl Committee Exhibit C.)

Q. Is the security just mentioned, the 8576 shares voting trust certificates for the Class B stock the only security given or pledged to secure the debenture bond issue of Realty as well as the G. A. F.? A. Yes, sir.

Q. You testified this morning, did you not, that the G. A. F. Company was virtually out of business? A. Inactive.

Q. And you carried the stock at a nominal sum, am I right? A. Yes, \$500.

Q. And that it had no assets? A. It has \$375 in the bank.

Q. But that is all its assets are, right? A. Surely.

Q. You also testified, did you not, that the stock of the Fuller Building Company pledged as collateral for these bonds also has no value? A. Very little.

Q. Very little value. Didn't you say this morning that that stock had no value?

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Mr. Marx: It is voting trust stock.

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The Court: What is the name of the corporation?

Mr. Bardusch: Fuller Building Corporation.

Mr. Marx: G. A. F. is the predecessor of the Fuller Building Corporation under the 77B plan.

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Mr. Bardusch: Let us have it straight, but the voting trust certificates represent shares of stock, Class B stock of Fuller Building Corporation?

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Mr. Marx: Yes.

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Mr. Bardusch: We are agreed on the names of the companies. I call upon you to produce the so-called Class B stock agreement that is referred to in the pledge and is referred to as well, I think, in your petition.

Mr. Marx: I haven't it here. I will send down for it. You did not give us any notice to produce.

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Q. Mr. Flohr, have you seen the petition in this proceeding before? A. Yes, sir, I have.

Q. Did you confer with counsel when it was prepared? A. Yes.

Q. You have been over it a good many times, have you not? A. I would say so. I was at various conferences.

Q. You know pretty well what is in it? You have read it? A. Yes—not every word. I hope you will give me a chance to refer to it, if you wish to refer to anything in it.

The Court: What paragraph is it?

Mr. Bardusch: Ninth, I think it is.

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The Court: Call his attention to it.

Q. Will you read that paragraph?

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Mr. Hartfield: What is the paragraph?

Mr. Bardusch: I think it is nine, Colonel.

Q. (Continuing) You have read that? A. Yes.

Q. You are quite familiar with it? A. Yes.

Q. You say that the only security back of the so-called debenture bond issues are these voting trust certificates for the Class B stock? A. Yes, sir.

Q. You also said that the stock had no value? A. I said that it had no realizable value.

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Q. That was not your testimony this morning. You said it had no value. There is an allegation I am going to read to you, "No other creditors or class of creditors are affected by the arrangement because the debtor proposes to and is able to pay all other of its debts, secured or unsecured, as they mature. All other funded debt of the debtor is secured and the only other unsecured debt besides the aforesaid guaranty is set forth in the schedules hereto annexed, and as the result of the current operations of the debtor, and the debtor proposes to pay such debts, secured or unsecured, as they mature." Do you say these bonds are secured? Do you agree these bonds are secured? A. Yes, sir.

Q. Fully secured? A. Oh, they are secured.

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Q. You said they had no value, did you not, and in spite of that you say they are secured? A. They are secured, yes, sir.

Q. And by what? A. By this stock.

Q. What is the stock worth? A. Very little at the present time. It might have some potential value.

Q. Mr. Flohr, toward the end of your direct examination

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you testified as to a list of institutional holders, so-called, who were at the conference and who you say agreed upon the amended plan. A. Yes.

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Q. Did all, each and every one of those file an assent to this plan? A. No, sir.

Q. Several of them did not, did they? A. I believe so.

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Mr. Bardusch: That is all, if your Honor please. I have finished, but I would like to put that other exhibit in, for which they are sending.

The Court: Yes, when it arrives.

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Cross Examination by Mr. Rickaby:

Q. Mr. Flohr, in reference to the Debtor's Exhibit 4, will you tell us how you came to prepare that exhibit. A. I was told I was going to be asked about the assets of the United States Realty and Improvement Company and I would be asked to give my opinion as to their value, and I prepared this exhibit, knowing that I would have to do that.

Q. I mean, who told you that? A. Our attorneys.

Q. Did you confer with anybody else about it, any of your other officers and associates, directors? A. Oh, I may have, yes, about some detail or other. I did—absolutely, I did.

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Q. I mean, it was prepared in accordance with the instructions of the recognized officers and directors of the company, isn't that the fact? A. Well, I guess that is right.

Q. And was prepared with a great deal of care, wasn't it? A. Yes, sir.

Q. And after giving the greatest study that the facilities of your corporation afforded as to the values of the various

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items about which you have testified today? A. Yes, sir.

Q. In referring to paragraph 9 of the petition, the statement which was just read to you, you will recall it was read to you by Mr Bardusch, you say in effect there that the debtor proposes to pay all of its other obligations. A. Yes.

Q. That was likewise prepared after discussion with the directors and officers of the corporation? A. Yes.

Q. It was authorized by the board, in fact, that statement? A. Yes.

Q. And it was taken into consideration that you expected to pay these debentures of the G. A. F. Company and the debentures of the debtor for which those debentures are exchangeable, wasn't it? A. As they became due.

Q. Those were expected to be paid in full? A. As they became due, yes.

Cross Examination by Mr. Arkush:

Q. Who prepared the balance sheets as of December 31 annexed to the amended plan? A. Why, it was prepared by us and certified to, you might say. It was prepared by our accountants, Arthur Andersen & Company.

Q. Do those balance sheets also reflect the opinion of the board of directors of the debtor as to values? A. This is the December 31?

Q. December 31 and I refer particularly to the balance sheets of the debtor appearing on pages 12 and 13 of the amended plan.

Mr. Hartfield: They do not purport to be any statement of the opinion of value. This is a book balance

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sheet and purports to show only book values, and if you will read the note at the bottom, it says, "The amounts shown on this balance sheet with respect to investments and real estate do not purport to be present or replacement or realizable values." Nobody attempted to put those values as actual values. This is a book balance sheet and everybody examined it, but there is that note at the foot of it.

Mr. Arkush: I will ask the witness as to the note.

Q. I call your attention to the note referred to by Colonel Hartfield at the bottom of page 12, Mr. Flohr. Does that note represent the opinion of the officers and directors of the debtor? A. Yes, sir.

Q. Take the sentence, "Some investments are carried at nominal values and undoubtedly some of these investments have values in excess of the amounts at which they are carried, particularly the investment in Plaza Operating Company." As I understand your testimony of this morning, you think that the investment in the Plaza Operating Company at the present time has no value, is that correct? A. No realizable value at the present time. I do not believe, if anything could be realized for it, that it would amount to anything.

Q. You were asked at the conclusion of your direct testimony whether this balance sheet, Debtor's Exhibit 4, represented in your opinion the fair value of the assets. Do I understand that you now modify your testimony to mean that you only meant the realizable value? A. Well, I am assuming that realizable and fair are the same thing, if we speak about today, I mean, what the asset is worth

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today, not what it might be worth next year or two years from now, I think that today. So that the fair and realizable value are the same thing.

Q. So in all your testimony as to values, you have not given any larger value than you think could be realized if the property were put up for sale today, is that right? A. Substantially.

Q. What other items were you referring to besides the Plaza Operating Company in the sentence at the end of the note on the bottom of page 12, what other items were there which undoubtedly had values in excess of the amount at which they were carried? A. Those carried at a dollar, they might have been worth \$50 or \$100, but not any substantial amount in excess.

Mr. Hartfield: Mr. Arkush, I know you want to be fair with the witness, but you pick out a part of the sentence. You see, what it says is, it is at present conditions in the real estate business—some book value. They do not purport to be present or replacement or realizable values. Then it says, "Some investments are carried at nominal values and undoubtedly some of these investments have values in excess of the amount at which they are carried, particularly the investment in Plaza Operating Company." But, I mean, if you will read that as a whole, what they are trying to tell people looking at this balance sheet is that this is a book balance sheet; that they do not represent present or replacement values; that these equities are unquestionably based on present conditions of the real estate industry in excess of the market value but

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there are some items, like Plaza, that may have a value in excess of the nominal value with reference to the \$175,000 notes receivable, one dollar.

Q. Take the Plaza Operating Company, did you have any appraisal made of that as real estate? A. No, sir, not recently that I know of. I cannot remember the last appraisal or if there was one made.

Q. Your opinion, as I understand it, of the value of the investment in Plaza Operating Company is based entirely on the earnings records for the last few years, is that correct?

A. I would say on its present earning record, yes.

Q. You did not take into consideration any value of the land and buildings as such? A. No, sir.

Q. Your opinion as to the Whitehall Investment, I take it, is based entirely on the Brown, Wheelock appraisal, is that correct? A. Yes, sir.

Q. Do you know what factors they took into consideration in making that appraisal? A. I believe, I don't know, but I believe that they considered earnings almost exclusively in arriving at that value.

Q. What is the present tenant occupancy of the building now, percentage? A. It is approximately 90 per cent rented.

Q. That is higher than the Trinity Building? A. Yes.

Q. Taking this Debtor's Exhibit 4, the note attached on the second page, note 1, and particularly the sentence, "Some of these assets are included at no value or at nominal values, and, undoubtedly, some have potential values in excess of the amounts at which they are included." Does that represent the opinion of the officers and directors of the debtor? A. I would say that that is my opinion.

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Q: When you say potential values, you refer to the possibility that the assets might be sold at higher prices at a future time? A. Yes, sir, I am taking cognizance of the fact that these are hard times and that these assets could not be sold probably for any amount in some instances, but a little recovery at some later date might prove of such benefit to them that they would have considerable value.

Q: You are a director of the debtor? A. Yes, sir.

Q: And you voted for this amended plan? A. Yes, sir, I did.

Q: In your opinion it is a fair plan? A. It is, sir.

Q: Do you base your opinion entirely on your opinion as to values today without regard to the future? A. I don't know whether I based it upon any values. I believe that the United States Realty & Improvement Company and the Trinity Buildings Corporation are agreeing to as much as they possibly can under the plan, and I believe what they are agreeing to is all that the bondholders can expect and do expect in most cases.

Q: Let us assume that in the future, and before the maturity of these proposed new securities that are offered to the certificate holders that Realty, the debtor, realizes considerably more than the values that you have put on its assets here, don't you think that some provision should be made that these certificateholders share in that good fortune? A. I do not know. Maybe they would rather have an investment at $4\frac{1}{2}$ per cent or 5 per cent than to get their money back. I could not say.

The Court: No, he says, suppose some of the assets of the debtor, U. S. Realty & Improvement Company, increase in value during the period of the

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extension of the certificates under the Trinity Buildings Corporation mortgage, in view of the fact that United States Realty & Improvement Company is guaranteeing the payments of the principal and interest to a certain extent, don't you think that the increase in the value of other assets of the U. S. Realty & Improvement Company should inure in some way to the benefit of the certificate holders under the mortgage of the Trinity Buildings Corporation.

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Mr. Arkush: Let me withdraw that question. Perhaps—

The Court: I think what you have in mind is pretty clear. Suppose, for instance, this Whitehall Building investment or Plaza Hotel investment, whatever it may be, increases in value in the course of ten years for which the extension will be sought, then shouldn't there be some provision in the plan by which the extent of your guaranty will be increased?

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The Witness: I think that would come automatically, your Honor. If our assets go up, the guaranty becomes so much better.

The Court: Undoubtedly, the security in back of the guaranty, yes.

Mr. Arkush: Maybe I can carry the witness along right from there.

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Q. Well, in other words, as the assets increase, the guaranty gets better, is that true? A. Yes.

Q. Would you consider it unfair to provide that that increase in value, so far as realized, should be preserved for

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the benefit of these certificate holders and not dissipated in any way?

The Court: What do you mean by that?

Mr. Arkush: I mean, your Honor, suppose the Whitehall Building or the Plaza Investment or any of their other assets are sold at a rather favorable price, it seems to me in some way or other—and I have a specific suggestion which I am going to put to the witness in a moment—some way or other that improvement in the guaranty should be preserved and they should not be able to turn around and dissipate that profit.

Mr. Hartfield: It is this, as I understand it, maybe there should be an agreement that U. S. Realty should segregate all its assets for the purpose of making good this guaranty which, of course, would prevent the United States Realty & Improvement Company from borrowing any money and pledging these assets and use that fund for corporate purposes.

Mr. Arkush: I have not made the suggestion.

Mr. Hartfield: Of course, and the U. S. Realty & Improvement Company proposes to guarantee again, even though it may be relieved under the provisions of the moratorium law, it proposes to guarantee the principal of these notes and to guarantee a certain rate of interest. Of course, it expects to be able to make good its guarantee in the hope that springs eternal in the human breast, and certainly the breast of every holder, that there is going to be an improvement in value; that we are at the low of values, but to suggest that—

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Mr. Arkush: I haven't suggested anything.

Mr. Hartfield: You suggest it should inure to the benefit of these bondholders. It does, if the corporate funds for the payment of the obligations are increased. But to suggest, as I understood him to mean by his line of examination, that there should be a segregation and an earmarking, and that the corporation should not use its assets for its proper corporate purposes is not sound.

Mr. Arkush: I have not suggested that.

Mr. Rickaby: Isn't it a matter of law, really? What happens is, assume that Trinity Buildings subsequently sold for \$6,000,000, if that happy day comes—and that may come eight years from now. In the interval, under this plan the bondholders are chiselled down to 3 per cent interest and the United States Realty walks off with two or three million dollars, if that event happens. Probably won't, but if it does happen, that is just the way it affects these bondholders. That is a legal argument, of course.

Mr. Arkush: May I proceed?

The Court: No, no. Let us follow this out. Who has the stock?

Mr. Rickaby: United States Realty owns all the stock of the Trinity Buildings.

The Court: Isn't it pledged?

Mr. Rickaby: Not that stock. That stock is not pledged. It is a free asset in their hands. They did not give up that stock.

Mr. Hartfield: There is a strict limitation in the plan against paying dividends on the stock. We

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could not pay any dividends, you know, until the interest is paid, this improvement fund is paid, or we could not pay any dividends in excess of the amount for which we have applied this fund—in no event exceeding \$50,000 a year. It is suggested we might in some way loot this property. We could not possibly do it.

Mr. Rickaby: No, don't loot it, keep it there, but sell it for \$6,000,000 and then pay off the principal. They have only had 3 per cent interest and you have \$2,000,000 then, it is true bondholders have been paid off at their rate of interest, and you will get it.

Mr. Hartfield: You forget part of the rate of interest is added to the principal. At the end they receive it. They do not get fixed interest. It is added to the principal at maturity.

The Court: I suppose some provision could be put in the plan to cover that suggestion, that if the properties owned by the Trinity Buildings Corporation are sold for a sum in excess of—

Mr. Rickaby: Now we are getting somewhere.

The Court: —the principal amount of the mortgage, that the sum thus realized shall be first applied in the reduction of the mortgage by the purchase or acquisition of 50 per cent or whatever it may be, 25 per cent, of the holdings of each certificate holder, because they could not pay them off then—

Mr. Rickaby: Theoretically, suppose this happens—

The Court: —but they could reduce them.

Mr. Rickaby: —suppose this happens, and this is possibly optimistic, perhaps fantastic—

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The Court: It may be, counsellor, since we are talking now about an issue of \$3,700,000—is that it?

Mr. Rickaby: Yes.

The Court: And we are worrying about that.

Mr. Rickaby: Yes.

The Court: There is a possibility, and that is a thought that has been running through my mind, of this property earning more than what it is earning now. Apparently it is at a low ebb. Well, I thought that perhaps the plan could be strengthened so that those earnings would go to the certificate holders. There would be no dividends at all on the stock during the period of the extension of the mortgage. That may be in the plan already, I do not know. Wait, just a minute. Now, your suggestion is a helpful one and I think that perhaps something can be molded from it that will insure the use of any surplus of any sum realized on the equity in retiring the bonds. That is what you want?

Mr. Rickaby: Exactly. As a matter of fact, the debtor owning all the stock of the Trinity Buildings surrenders none of it; the bondholders take all the sacrifice, and the debtor, as the holder of all the stock of the Trinity Buildings, keeps all the hope. That cannot be done.

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By Mr. Askush:

Q. Mr. Flohr, how many shares of stock has the debtor outstanding? A. 900,000 shares.

Q. Is that stock paying dividends? A. No.

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14 Q. Has it paid dividends for some time? A. It hasn't paid dividends for some time.

Q. Would you think it unfair—

The Court: That is very indefinite. Tell us what you mean by that. What is "some time"?

The Witness: It is long enough so that I have forgotten when it was.

The Court: When the memory of men runneth not to the contrary?

I think you said something to the effect that since 1930 or 1931—wasn't it? There hasn't been any dividend since about 1931, I think it was.

Mr. Marx: Yes.

The Witness: 1931 was the last dividend. The last dividend was paid in 1931.

The Court: All right, go ahead.

Q. Is there any probability of dividends being paid in the future, say, in the next ten years, Mr. Flohr?

Mr. Rickaby: I object to that as calling for a conclusion; speculative.

Mr. Arkush: I withdraw that.

16 Q. On the basis of your estimate of earnings in the future, which is already in evidence, is there any possibility of dividends?

Mr. Hartfield: He carried his estimate only up to 1941.

The Court: That is as far as he went.

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Mr. Arkush: That is as far as my question goes.

Mr. Hartfield: That is all right.

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A. I do not think there is any chance that dividends will be paid before December 1, 1941.

Q. Do you think there is any reasonable probability within the next ten years of the Realty Company being able to pay dividends on its stock out of earnings of its subsidiaries or out of its profits?

Mr. Rickaby: I object to it as merely speculative and calling for a conclusion.

Mr. Arkush: We have had the guesses of the witness all day.

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Mr. Rickaby: Not for ten years.

The Court: Overruled. Answer the question.

Mr. Rickaby: Exception.

A. I cannot answer the question. I do not know.

Q. Would you go with me so far as to say that unless Realty sold some of its properties at a substantially greater value than you have placed on them, there would be no possibility of dividends?

Mr. Hartfield: I object to that, calling for something that may happen in ten years. Nobody can prophesy.

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The Court: Overruled. That is on a definite basis.

Q. (Read.)

The Court: To the Realty Company stockholders?

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Mr. Arkush: Right.

Mr. Hartfield: That assumes that there is no reclassification of the stock or anything of that kind?

Mr. Arkush: Yes.

The Court: Yes, as is.

Mr. Arkush: Yes.

A. I cannot conceive that there would be any dividends paid within the next ten years.

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Q. Then would you as a director object to this plan being amended to provide that there be no dividends paid while these certificates are outstanding? A. I don't know whether I would or not. I believe that I would object.

Q. You think it would be unfair? A. I believe that directors represent stockholders and I think I would not be doing my duty to the stockholders if I agreed to any such plan.

Q. Do you think it would be unfair if Realty improves its position to such an extent that it would be able to pay dividends that these certificateholders should not first be paid off? A. I think the plan is fair the way it is.

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Q. But you told me that you based the plan on these values that you placed on these assets. Would it be unfair if substantially greater values are realized to protect these certificateholders to that extent, that the excess realization should not be paid out to the stockholders of Realty without paying off these certificates?

Mr. Hartfield: Mr. Arkush, in asking that question, have you taken into consideration the undistributed profits tax situation, insofar as they may have to pay a very large percentage to the government if they

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made an agreement not to pay out dividends? And I would like to ask, as a matter of argument, how would it be possible for these other assets to go up in value and not have improvement in the rental value of these buildings? Anybody who knows this situation knows that for the next few years these two buildings are not going to pay even fixed interest on these bonds, and United States Realty is going to have to go into its pockets and get up money to make good its guarantee on even the fixed interest, because these buildings are not going to pay it, because new leases are not made on the attractive terms that we would like to get, but we have to rent the building. We have to deal with certain factors, fixed factors, what is being produced by the building. If other values go up, this building value will go up.

Mr. Arkush: Not necessarily. Whitehall is in a different situation. Factors may come into existence that may enable them to sell those buildings without improving those buildings.

The Court: What you are doing in this proceeding is to reorganize the guarantee that you have given, isn't it?

Mr. Hartfield: I wouldn't say it is to reorganize it. We are making an arrangement with our creditors with respect to this guarantee.

The Court: That is, I expect you are making an arrangement with respect to that guarantee?

Mr. Hartfield: Yes.

The Court: You yet have to go to the State court.

Mr. Hartfield: To get a reorganization of the Trinity Buildings obligations.

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The Court: In respect of this mortgage?

Mr. Hartfield: That is right.

The Court: How do we know what terms the State court may impose? That is, I think, one of the main difficulties about this proceeding and for the consummation of it in advance of the other.

Whether the two could be carried through at one and the same time, and the two courts cooperate to the extent that what is arranged for the bonds by the State court would apply to the guarantee here, at least to the amount of the interest and the like, that would be one way of meeting it. One of the things that has given me some concern is how I can reorganize the guarantee with the reduced interest rate until you first have the reduced rate interest fixed by the State court in reorganization.

Mr. Hartfield: It is a condition, ~~you~~ know, of the Burchill Act.

Mr. Marx: I am partly responsible for that, and I think my reasons are logical. In the first place, we wanted a precedent in this court to go to the State court with. In the second place—

The Court: The two courts could work together on it.

Mr. Marx: In the second place, your Honor, unless we get this done here and consummated, why, we are going to be running around, chasing after these fellows with powers of attorney. There is merely an extension of a limitation of this guarantee.

The Court: It is conditional upon.

Mr. Arkush: No, it is made absolutely.

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Mr. Marx: It is absolute. In other words, if this case goes through, the other will have to go through—no, will not have to go through, but the pressure will be put on it.

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The Court: We would not want to operate in that way. We would want to cooperate, not to coerce.

Mr. Marx: It is not coercion. We have a state of facts now which may change to some extent. We figured that when this was settled in this court it would go through the Burchill court without any hitches.

The Court: I know, but the point is this, counsellor, that we cannot be sure of that.

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Mr. Hartfield: But your Honor has in mind, don't you, that by this arrangement, although under the moratorium act U. S. Realty & Improvement Company may have no legal obligation, we are making an absolutely new commitment, an agreement, which we are asking your Honor to determine is fair and equitable. This agreement of ours, agreed to by a majority of amount and number, which the courts say on its face is strong evidence of its fairness, is presented to your Honor. Here we come to make an independent agreement when we are not under any legal obligation to make it, when we know it is a contribution by us of a very considerable amount. It is in no sense conditioned on the Burchill plan reorganization because if the Burchill plan stays as it is, and they do not do anything about the mortgage, which I cannot conceive to be so, our obligation to pay this guarantee; which is an independent thing, which sur-

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vives the moratorium act, which we are contributing, and if your Honor finds the plan is fair and reasonable, upon the testimony, it will inure to the benefit of these noteholders and we will be required to pay the interest specified in this plan. There will be added to the principal at the maturity the amount that we have guaranteed and we cannot hope to get any equity out of this property until the bondholders have received, not only the principal and the fixed interest, but also this additional interest.

The Court: But, Colonel; don't you see that you have more than that in your plan? For instance, you have a provision that \$50,000 of the income of the property be set aside for certain structural improvements or, we will say, structural replacements. All right. Now, how can you bind the Trinity Buildings Corporation to anything of that kind? That is one of the conditions of your plan here, however, for the U. S. Realty & Improvement Company. What would be the objection—

Mr. Hartfield: Your Honor has in mind that that provision about the \$50,000 is only effective in the event that a plan under the Burchill Act provides for that? The noteholders have agreed to that. The language of it is that "In the event the plan is consummated under the Burchill Act, all available net earnings for each calendar year, until and including the year 1948, but not in excess of \$50,000 for each year, shall be, on or before March 10 of the succeeding year, deposited in a special account." That feature is conditioned on the Burchill plan. But our guarantee.

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once you approve it as fair is unconditional itself— if this property was worth the amount of the mortgage. Then the guarantee becomes an absolute binding guarantee and you cannot wipe that out by using the word chisel, which one counsel has been using so frequently, which gives it effectiveness.

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Mr. Rickaby: Emphasis.

Mr. Hartfield: Irrespective of its position as a creditor in this thing, irrespective of the fact that the earnings of these buildings are now insufficient to pay fixed interest, to pay this amount, we do it, and we run the risk of there being a Burchill plan being made effective. It is true one of the provisions will not be effective unless the Burchill plan also provides for it but in no way affects the validity of our guarantee.

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The Court: What objection would there be to having Trinity Buildings reorganized under Chapter X, reorganizing this particular mortgage under Chapter X in this court? Then the two proceedings could run along hand in hand. Under 77B you could reorganize and I assume the same is true under Chapter X, you could reorganize one of these mortgages, and you could reorganize the guarantee and the guarantee would stand.

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Mr. Rickaby: If your Honor please—

The Court: That obligation of the third party could not be dealt with in that proceeding.

Mr. Arkush: May I continue my examination?

The Court: No, you may not. This is basic and it means more than the mere matter of whether one asset is worth \$100,000 or worth \$50,000. You see, if

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the other proceeding were started in the State court, then I could confer with the Judge in the State court or he could confer with me and we could try to work out some solution of the matter that would not make one conditional upon the other, the other not having been started as yet, but would terminate both of them with the same conditions set forth. One in the arrangement in this court under Chapter XI with respect to the guarantee and the other in the State court under the Burchill act in respect of the mortgage. That, I can see, is a logical way of handling the matter. Either have both proceedings in this court, one under Chapter X and the other under Chapter XI, or else start your State court proceeding and let it run along with this proceeding in the Federal court and work it out concurrently, that is, work out the two plans concurrently. It seems to me more practical, Colonel, that is the point. I think I might be doing something that would only handicap the proceeding in the State court and perhaps confound the issues there.

Mr. Hartfield: We do not agree with your Honor and we hope you will bear with us, but we do agree on one thing, if we have to go to the Burchill Act, that it cannot be done alone under Chapter X, because we could not under any possibility come in under Chapter X. Your Honor is probably familiar with 1775 Broadway, where the Court held they could not release the claims—

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Mr. Arkush: I want to suggest to your Honor, as you have already made one suggestion to Colonel Hartfield, as a noted draftsman, ~~that you ask him to~~ consider this second suggestion, namely, that there be a limitation on the right of the debtor to declare out dividends on any magic money which may be realized in the future until our certificates are paid off. I think if that is conceded our committee will be glad to approve this plan, and whatever procedure is worked out.

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The Court: Were your questions directed to that?

Mr. Arkush: Yes. The other qualification we have is of a purely legal nature, which the witness would not be qualified to speak on, namely, that in case any reorganization or bankruptcy proceedings as a whole are started against this debtor or initiated by it, as distinguished from a piece by piece reorganization of its various situations, that when our certificates should immediately be matured. That should be put in the acceleration clause in the indenture.

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The Court: How can you do that unless you have the Trinity Buildings Corporation?

Mr. Arkush: That should be agreed to by the Trinity Buildings Corporation.

The Court: You will have to arrange that in the State court proceeding.

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Mr. Arkush: I think there is a great deal of force in what your Honor has said but, after all, that is procedural.

The Court: I think that is what Mr. Arkush was driving at in his questions, and that is why I thought

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we might as well dig into the legal phase of it which, after all, we have to consider, the legal framework. We have had a good deal of testimony on it.

Mr. Marx: Your Honor, I am sure, is going to consider this question on his consideration of the case, but I want to call attention to the fact that the amended plan provides as accepted by a majority in number and amount that no Burchill Act proceeding and no other proceeding is to be instituted on the plan by the mortgagee or by the holders of the certificates until the arrangement of Realty has been confirmed under the Chapter XI proceeding. There is an absolute covenant there not to start a proceeding there until this proceeding is completed.

Mr. Rickaby: I think your Honor got a very clear idea from the frank statement of Mr. Marx. Of course, if they are successful in this plan, it does amount to practically a coercion in the State court. They have another reason they want to go into the State court and that is that they think perhaps the doctrine of the Boyd case, the Day and Meyer case and the Barclay case, which I recited to your Honor, might not be applied in the State court and that there may be a different rule. And they know very well if Trinity Buildings Corporation comes in under Chapter X, it will evolve out of Chapter X with no stock interest in it still owned by this debtor.

The Court: That has not been the case in other reorganizations in 77B, where they have not attempted to change the principal amount of the indebtedness. They have been permitted to provide for different

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times and amounts in connection with the interest and for sinking fund changes and the like, but when it came to changing the principal amount of the bonds—

Mr. Rickaby: Reducing interest—

The Court: No, wait a minute. We have all overlooked something. In 77B you could not deprive a party of his security, you see, and they were changing part of the principal of the debt which was secured by the mortgage into stock.

Mr. Rickaby: And there are decisions, plenty of decisions, your Honor, to the effect that the creditor is entitled to his full principal and his full interest, and in the language of the Day and Meyer case, an equity cannot be carved out of him for the benefit of stockholders.

The Court: No, you could have a nominal stock interest. What difference would it make whether they had seven or eight thousand shares of stock worth \$5,000 or had 500 shares of stock worth \$5,000? Would not make a bit of difference. That stock, and it is entirely owned by the Realty Company, U. S. Realty & Improvement Company, that stock would represent the equity. There would not be any change in that.

Mr. Rickaby: That is just what was in the Barclay case.

The Court: I know; I don't think so.

Mr. Marx: No lien is impaired.

Mr. Rickaby: I claim to have had a little experience in 77B, and if you reduce principal or interest, you

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have to give the creditor something for it. In other words, the stockholder cannot remain unaffected when you reduce the creditors' claim to any extent. He has got to give up something.

The Court: But you have a right to rearrange the interest. Otherwise, what would be the use of 77B?

Mr. Hartfield: He has overlooked completely the fact that U. S. Realty is also a creditor of this company.

Mr. Rickaby: Your Honor is correct.

I have not overlooked 620 Church Street either.

Mr. Marx: U. S. Realty is also contributing \$25,000 to the expense of the Trinity Buildings proceeding.

Mr. Hartfield: May we now close this meeting?

Mr. Brozan: Will your Honor permit me to ask a few questions of this witness?

Cross Examination By Mr. Brozan:

Q. In the pro forma—

The Court: I am permitting you to question this witness because you represent two bondholders, not because you have any standing in the proceeding, but simply because you have made a request.

Q. In the pro forma balance sheet, you have given no value to your investment in Trinity, isn't that so? A. Yes, sir.

Q. And that is because you stated that you believe that interest has no readily realizable value? A. Yes, sir.

Q. But you do not believe that the properties at 111 and 115 Broadway are worth more than \$3,700,000, do you?

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A. Well, I think in the Burchill Act proceeding that will come out. If they are, why, the bondholders will get their money, if somebody is willing to pay it. 853

Q. Will you just please tell me? You have been qualified as an expert as to the value of real estate.

The Court: Answer the question.

Q. (Read). A. I don't think that any more than \$3,710,000 could be realized today.

Q. I ask you again whether or not you believe that these properties are worth more than \$3,700,000 today? Can you answer that yes or no? A. Yes, I believe they are worth more. 854

Q. When you say you believe they are worth more and at the same time say you do not believe that they can realize more, what do you mean? What is the distinction in your mind? A. I do not believe that anybody that has \$3,700,000 would use it to buy the buildings.

The Court: He means you could not sell them for that, counsellor. If you own any real estate, you know that what you think you have is real estate worth a great deal, but you get out and try to sell it.

Mr. Brozan: I am asking this witness as an expert qualified to testify as to values, whether or not these properties are worth more. 855

Q. Let me ask you this question, is there a protest now on record by the company against real estate assessments, tax assessments in the City of New York?

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The Court: Which company?

Mr. Brozan: By Trinity.

A. There is not, no.

The Court: He means as to the assessed valuation.

Mr. Brozan: Yes.

Q. There is not, now? A. No.

Q. What is the last one that was filed for Trinity?

A. That was for the tax year beginning July 1, 1939.

Q. And in the protest which was filed what value I you ascribe to these properties? A. I cannot tell you exactly but it was around \$7,000,000.

Q. And that value of \$7,000,000 represents the value which the board of directors of Trinity fairly believes to be the value of the properties, is that right? A. I don't think so. I believe that that is a value that the board of directors believed the property was worth not in excess of, if that is not a funny way of putting it.

Q. As a matter of fact, they think it is worth less? A. They do think it is worth less.

The Court: They are ready to pay taxes on that value, is that what it means?

The Witness: Yes, sir. I mean, that was the value that we put in there to get our taxes down.

Q. You did not put it in to get your taxes down without believing that it was worth at least that? A. No, I think for any other purpose the directors of the company would state that the property was worth less than that.

*Adjourned Meeting of Creditors before Judge Leibell—July
7, 1939.*

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Q. What is the assessed valuation according to the latest issued assessment of both properties? A. \$10,500,000.

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Q. So in the opinion of the board of directors this property was over-assessed by at least \$3,500,000? A. At least that.

Q. If these properties were properly assessed this company would have a net income annually enough to pay its full interest obligation on the bonds, I mean, Trinity would have, would it not?

The Court: What do you mean by properly assessed?

Mr. Holden: I will rephrase my question.

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Q. If these properties were assessed by the tax assessors of the City of New York at a value which the directors, the board of directors of the company believe to be the fair value thereof, the net income of Trinity annually would be sufficient to pay its full interest obligation on the bonds? A. If you mean that if taxes were reduced also by 5½ per cent, I would say yes.

Q. If the taxes were reduced, your expenses would be reduced and your net income would be greater? A. Yes.

The Court: Reduced to what figure?

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Q. Let us take \$7,000,000—

The Court: Yes.

Q. —as the figure, how much would be the saving on your taxes in New York City annually? A. About \$100,000, I would say.

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7, 1939.*

Arthur J. Flohr—for Debtor—Cross.

862 Q. And for the year 1938 your deficit on operations was \$51,000, is that right? A. Yes, approximately.

Q. So if your assessment had been \$7,000,000 then for 1938 you would have been able to pay the full amount of your interest for the year 1939? A. We would have earned it, yes.

863 Q. Don't you think that, it would be fair for your plan and arrangement to provide that if there is a reduction in taxes to the City of New York there should be an upward change in the interest rate on these bonds? A. Not necessarily. I do not believe there is anything peculiar about reducing the rate of interest on a mortgage when it becomes due. That has been done.

The Court: No, the point is this, if there is a saving, so that the fixed charges against the property are reduced, together with the interest on the mortgage, that the certificate holders should have some benefit of that?

The Witness: It is true they will have a benefit of any reduction in expenses that we might be able to effect up to the amount of the interest that we have agreed to pay.

864 The Court: Beyond that in the plan, or an amendment to the plan, it might be possible to take care of any increase in the net income, no matter what the source.

Mr. Marx: It goes to the sinking fund. It is proposed to retire the bonds as much as possible.

Mr. Brozan: How about restoring the interest they are losing now?

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Mr. Rickaby: The sinking fund merely buys them up.

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The Court: We understand that.

Mr. Brozan: Under this plan they provide that the additional rate of interest for the first five years shall be one per cent, if earned. If they are going to provide for an addition, if earned, why limit it to one per cent?

Mr. Marx: Cumulative.

Mr. Brozan: If they earn more.

Mr. Marx: If it is not earned, it is payable at maturity.

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Mr. Brozan: Why make them wait until then? You may not be in existence then.

The Court: There may be some other way of conserving the assets, and other counsel have made that point, and it would apply to any saving from taxes or anything that would increase the net income of the Trinity Buildings Corporation, the obligor under the bonds, mortgage or under the indenture. Now, something might be done along that line, if we can get around the legal formalities so that the certificate holders would get the benefit of any increase in net earnings of the buildings. Of course, you do not need to argue that. You do not need to question him about that any further, because it has already been suggested that some amendment that would carry with it a general provision that would encompass a general provision, so that the certificate holders would get the benefit of any increase in the earning capacity of these two build-

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Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

Arthur J. Flohr—for Debtor—Cross.

ings, should be made. They are two very fine buildings. They are in a good section of New York. One of them is, as I recall it, right alongside of Trinity Churchyard and has all the light and air there from that large vacant plot of ground. The other one is right above it with that narrow street in between. Well, you know, gentlemen, that real estate these days, if you own any of it, you certainly do know it, you cannot go out and sell it for a certain sum, and you do not get the income from it that gives you any sort of return on your investment. In many cases it carries itself. Around New York you will see them tearing down buildings many stories high and putting up what? Just taxpayers. Against what? Against the day when things may improve so that there will be a demand for space and you can get some return. I agree that a plan that does not accomplish that purpose now should be amended so that that possible increase in the earning capacity of the building during the extended period of the mortgage will inure to the benefit of the certificate-holders and not be available by way of dividends on stock of the Trinity Buildings Corporation, that would go to the present debtor, the United States Realty & Improvement Company as the owner of that stock.

Mr. Marx: Those limitations are all contained.

The Court: We will study that carefully and if there is anything further which should go in to fulfill that purpose, it should go in. You see, they would love to get that building down to an assessed

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valuation of \$7,000,000. I suppose 99 per cent of the owners of real estate would be glad to do it, but what would happen to the City of New York? Can you sell that idea to the Board of Estimate? Where are they going to get the money to pay interest on the city bonds? What would happen to city bonds? What would happen to them if they went around and reduced the assessed valuation on all the buildings 30 per cent? They would not have enough money to balance the City budget. How much is derived from taxes on real estate? Cut it by 30 per cent. Would the City be able to pay its way? It could not.

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I do not think you can look for much relief along those lines. You have to be practical. The City has to live; it has to have taxes. If it does not get the amount it needs why, it is in a bad way. If you figure $2\frac{3}{4}$ per cent on a certain assessed valuation, it will be 5 per cent on a reduced valuation, whatever is within the constitutional limit. I do not know whether there is a constitutional limit on it or not. However, in Westchester, the tax rate is a whole lot higher than it is in New York City. So, we have to be practical about this thing. I hope that there may be some saving in taxes for you but the main hope in this case is that you will get more out of the building. That is your best anchor to windward to keep you from going on the rocks entirely. That will depend upon a general improvement in real estate conditions, I think. This property is well located. Any of us who have been around the City a good many years, who know something about the development of real estate

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Arthur J. Flohr—for Debtor—Cross.

along old Broadway, can recall these buildings. Space was always demanded. Stock brokers and lawyers were the principal tenants, weren't they?

Mr. Marx: Yes, principally stock brokers.

The Court: Let us hope conditions will improve. Stock brokers are reducing space, everyone knows that, and they have a hard time meeting their overhead. They have not been able to make the money that they used to make. There is the real difficulty with the case. That is the cause of your trouble. That is a proper diagnosis. They are not getting the rentals out of this building that they used to. There is your trouble and I suppose that is true for practically every real estate company that holds or owns large buildings downtown, or uptown, for that matter.

Q. About this improvement fund, since January 1st of this year what expenses has the corporation had for improvements which in the future you intend to charge against this improvement fund? How much has that amounted to?

A. I would say none.

Q. And in the year 1938 how much? A. It is hard for me to think of all—I believe the improvement fund is for something entirely different from any expenses that we have had. The improvement fund was originally thought of with the idea of providing a fund that might accumulate to a substantial amount over the years and when the building, which is very old, as buildings go, required, for instance, new elevators, or air conditioning, or some expensive large structural alteration, there would be money with which to do it, so it would remain competitive in the downtown district of New York.

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7, 1939.*

Arthur J. Flohr—for Debtor—Cross.

Q. Under the plan as now proposed, if you do not have such improvements, isn't it permissible for you to transfer this whole fund to the sinking fund and use it to purchase bonds in the market? A. I would rather have Mr. Marx answer that. I don't know whether it is permissible. I think there is a provision that we could buy—whether we could do it or not—but the plan speaks for itself.

Q. There is nothing in the plan that requires you—

The Court: What do you say about that?

Mr. Marx: "Further, upon the written consent of the corporate trustee, funds at any time on deposit in the improvement fund may be requisitioned by the board of directors of the new company and applied to the sinking fund hereinafter described." In other words, at any time the improvement fund was not necessary, or we had accomplished what we wanted here, why, these funds could be used to retire bonds and go to the benefit of the bondholders instead of just lying fallow.

Q. If the rate of interest is reduced permanently to 3 per cent, ...t the market value of these bonds also permanently reduced so that you will be able to buy them in the open market at approximately what they are selling for today?

A: I could not say that.

The Court: Counsellor, if they were sure of getting 3 per cent and had the two buildings behind the bonds and a good guarantee, I do not know that the value would be reduced. I think, as a matter of fact, if the

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*Adjourned Meeting of Creditors before Judge Leibell—July
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uncertainty as to whether they would get a certain sum one year and a certain sum another year, or a postponement of interest for a while, were removed, that even with 3 per cent bonds, with two good buildings in back of them and with a guarantee that they say is absolutely good, or will be absolutely good, in fact might serve to stabilize the value of the certificates. That is my view of it and I think that has been the experience in some other cases. What do you folks say?

When you finish the court procedure, you see, and there is something that goes out as a result of it that is stable, then you have a value.

Another thing, a sinking fund for the purchase of these bonds is a good thing because it affords a market so that anyone who wanted to sell a bond, it might be distress selling; would have a place to go and would not have to go to some place else where the price might be very much scaled down on him. As to whether or not this money should be used for the sinking fund or should be just kept or should go in additional interest to the certificate holders, that is something we will determine.

Mr. Brozan: That is the point I was after, your Honor: It seems to me that if they do not use the improvement fund for improvements—

The Court: You think that should go to interest?

Mr. Brozan: Either to interest or retained as an improvement fund, or later go to the certificate holders, if not used for that purpose.

Adjourned Meeting of Creditors before Judge Leibell—July 7, 1939.

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Mr. Bardusch: I want to offer this in evidence to complete the record.

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I offer into evidence Class B common stock agreement, dated as of January 31, 1936, between U. S. Realty & Improvement and Fuller Building Corporation.

(Marked Earl Committee Exhibit D.)

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Now, if your Honor please, annexed to our papers for leave to intervene, or part of them, were our objections to the plan. They were served a week or so ago. I am now asking leave to file supplemental objections addressed to the fact that all parties are not before the Court, in that the debenture bond issue, so-called and so characterized in this plan, as a secured bond issue, is an unsecured bond issue, and that under the terms of the Bankruptcy Act, Chapter XI, the holders of those debentures are at the most partially secured creditors and are general creditors as to any amount in excess of the amount of their security.

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The Court: Is it your idea then that under Chapter XI a debtor has the right to reorganize any part of his debt except a totally unsecured debt?

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Mr. Bardusch: I think it is restricted; by virtue of their plan it is restricted to their unsecured creditors.

The Court: I am talking about Chapter XI.

Mr. Bardusch. Yes.

The Court: Can they reorganize any debts but unsecured debts under Chapter XI?

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7, 1939.*

Arthur J. Flohr—for Debtor—Cross.

Mr. Bardusch: No, I think it is restricted to unsecured debts.

The Court: Does it depend on the value of the security? Suppose the shoe were on the other foot and they came in and said, "Why, we are going to reorganize this debt that is only 10 per cent secured to the extent of 90 per cent that is unsecured"—could they do it?

Mr. Bardusch: It is a grave question in my mind. That is why I do not think this act applies to this proceeding.

The Court: I mean, on the question of whether these debenture holders that have seven or eight thousand dollars which relate to the Fuller Building Company, whether they are unsecured creditors within the meaning of the Act?

Mr. Bardusch: Yes, because, I believe that secured creditor means something.

The Court: Cover that in your brief and file supplemental objections.

Mr. Bardusch: That is all I ask.

The Court: The Securities & Exchange Commission has been represented here and has sat very silently through the day, following the proceedings.

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Mr. Panuch: Your Honor, so far as we are concerned, we earnestly believe that this case belongs under Chapter X and that it is a jurisdictional error to have it under Chapter XI.

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(Adjourned to July 10, 1939, 12 o'clock noon.)

**Adjourned Meeting of Creditors before Judge
Leibell—July 10, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Bankruptcy No. 74,023.**

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[SAME TITLE]

Before :

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 10th, 1939 :
12:00 o'clock noon.

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A P P E A R A N C E S :

WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph A. Bennett, Esq., and
Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.,

Attorneys for Ralph W. Earl and
Donald M. Halsted, as members of
Bondholders Protective Committee.

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SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee
of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and
H. McAfee, Esq., of Counsel.

*Adjourned Meeting of Creditors before Judge Leibell—
July 10, 1939.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Esqrs.,

Attorneys for Guaranty Trust Company
of New York, as Trustee;

J. Howland Auchincloss, Esq., of Counsel.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage certificate-
holders.

WATSON, KRISTELLER & SWIFT, Esqrs.,

Attorneys for R.^o Gilbert Jackson;

Frederic W. Dillingham, Esq., of Counsel.

J. A. PANICH, Esq.,

Attorney for Securities & Exchange
Commission, Amicus Curiae;

George Zolotar, Esq., of Counsel.

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*The Court: I have signed the order, the third paragraph of which reads as follows: "It is hereby decreed, therefore, that for the purposes of the arrangement and its acceptance claims have been filed by the holders of 495 in number of such share certificates and by the Beha Committee on behalf of 56 in number of such holders, aggregating \$3,710,500." The fourth paragraph of which is: "Acceptances in writing are hereby determined to have been filed by 304 holders of such sharecertificates aggregating \$1,961,500 principal amount." And the fifth paragraph: "It is hereby determined therefore that the arrangement has been accepted in writing by a majority in number of all creditors affected by the arrangement whose claims have been proved and allowed

*Adjourned Meeting of Creditors before Judge Leibell—
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before the conclusion of the meeting, which number represents a majority in amount of such claims."

And, of course, the stenographer has noted on the record that there were certain additional claims filed here this morning and they were allowed.

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Mr. Rickaby: I would just like to call your Honor's attention to a point that appears from the record. There are other unsecured creditors, that is, these debentures have no security behind them, the so-called security is revokable and can be called away and its value is nominal.

The Court: What do you mean, it is nominal?

Mr. Rickaby: Under the indenture they can be withdrawn from the pledge, but irrespective of that—

The Court: What are they to substitute for it?

Mr. Rickaby: Nothing.

Mr. Bardusch: Since I have raised that, may I say a word, if you please, Mr. Rickaby?

Mr. Rickaby: Yes.

Mr. Bardusch: Your Honor, the other day, when I introduced in evidence the four agreements which I felt covered that situation, I did not discuss here in court the tenor of those agreements. The agreement of pledge provides that the stock of the Fuller Building Company is deposited as collateral security for the two lots of debenture bonds subject to what was called the Class B common stock agreement. That agreement provides in effect that the Fuller Building Company has the right upon the happening of a certain contingency, namely, the amount of its earnings, to withdraw that stock, to get it back from the debtor, and the pledgee has

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no rights in there, he must give it up, willy-nilly, and there is nothing to be substituted for it.

898 The Court: I know, but has the Fuller Building Company the right to get it back and pay nothing?

Mr. Bardusch: And pay nothing, and they must surrender it to the Fuller Building Company.

The Court: Have they done it?

Mr. Bardusch: They have not done it up to this moment, but I contend it is a mere contingent pledge.

Mr. Marx: No, it is more.

The Court: It is an actual pledge subject to its defeasance or its elimination by a condition subsequent.

899 Mr. Bardusch: Yes, but there is nothing to be substituted for it.

The Court: But whether it is or not, now, if we are not to consider the value of this surety and merely the fact that it is up under an agreement, then these claims are the only unsecured claims, those of the certificateholders under the guarantee, and that the debenture holders, that this George A. Fuller—

Mr. Bardusch: No, it is not George A. Fuller. Fuller Building Company.

000 The Court: —Fuller Building Company as secured, are not unsecured creditors. Have any of you looked into that point as to whether or not the Court has the right, in determining whether a creditor is secured or not secured, to consider the value of the security?

Mr. Marx: No.

Mr. Bardusch: I maintain this proceeding being in bankruptcy that the provisions of the bankruptcy law, by the very title of this Act, by which it says that the provisions of Sec-

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tions 1 to 6 apply insofar as they are not inconsistent, and I cannot find anything in this Act dealing with an inconsistency. While we have not briefed the point yet, you said you wanted briefs by the end of the week, I feel very seriously about that.

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The Court: All right; I have signed this order now because we have gone ahead on the assumption that the certificate-holders were the only unsecured creditors. If it develops later, as a matter of fact and law, that there are other unsecured creditors, these alleged debentureholders, I, of course, can always enter an order modifying this order.

Mr. Bardusch: Merely for the purpose of the record, may I have an exception?

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The Court: You want to make your record, and you have it.

Mr. Bardusch: And we will submit these documents to your Honor when we submit briefs, and I have an exception.

Mr. Rickaby: That was my sole purpose. I would like to have an exception.

The Court: You just wanted the record to be straight.

If I should find later that these debentureholders are unsecured creditors why, of course, we might have to give consideration to that and reopen the matter.

Mr. Marx: Well, your Honor, if that should happen, then we would have to go into the question of whether or not this is an arbitrary and unjustified classification under Chapter XI.

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The Court: All right. Apparently everybody in seeking representation here looked only to the certificateholders, anyway, and nobody has appeared here for those debentureholders.

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Mr. Bardusch: No.

904 The Court: The Court will take notice of the fact that the testimony shows there are debentureholders.

Mr. Bardusch: The point is it leaves the debentureholders unaffected, thereby cutting down the certificateholders. That creates a preference for the debentureholders.

Mr. Marx: That is specifically provided for in the Act, I think Section 351, which states that the Court may fix the division of creditors into classes.

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905 The Court: You may have this in mind when you write your briefs, that the way this case shapes up is about as follows: First, we have a contention on the part of the Securities & Exchange Commission that this proceeding does not lie under Chapter XI of the new Bankruptcy Act, known as the Chandler Act, but that the complete reorganization of the debtor should have been brought under Chapter X of the Chandler Act. The Securities & Exchange Commission in support of that contention refers to the minutes of the hearings before the committee in charge of preparing this bill and its submission to the Congress for enactment. It would appear from the hearings before the committee in the House that it was the purpose of the members of Congress to have Chapter XI serve particularly the smaller business type of debtor who had unsecured creditors. That type of debtor had been securing relief under former Section 77B, where he really did not belong. Chapter XI afforded him a so-called arrangement with creditors, practically, or a composition—that is what it amounted to.

Although it may have been in the minds of the members of

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the committee of the House that Chapter XI would serve that purpose and its application be limited to that class of debtors, there was nothing put in the Act itself to exclude any debtor, large or small, if he could otherwise qualify under Chapter XI, from seeking relief under that chapter, even though he had secured creditors, if what he sought was to reform in respect to his unsecured debts.

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Another point has been raised, and that was just discussed, as to whether or not the sole unsecured creditors of this debtor are the certificate holders under the mortgage made by the Trinity Buildings Corporation, of which this debtor is the guarantor, or of the holders of the debentures that were issued by this debtor and which are secured under a pledge agreement, the security being certain stock of the Fuller Building Corporation. Are those debenture holders also unsecured creditors? That is a point you will brief.

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Assuming that we decide that, after considering the briefs, the proceeding is properly brought under Chapter XI, and that the only unsecured creditors are these certificate holders, and, of course, I have already found that a majority in amount and number of those certificateholders who filed claims have accepted the modified plan, we then meet the phase of the case where the obligation is placed upon the Court to determine whether or not the plan is fair and equitable and workable.

Taking up the last word first, whether or not it is workable. I think that there we encounter some difficulty, in view of the fact that the plan is one submitted by the debtor as the guarantor of the payments of interest and principal due under the mortgage made by the Trinity Buildings Corporation, which is a lien on the two buildings, 111 and 115 Broad-

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way, Borough of Manhattan, New York City. We have not in this court in any proceeding the mortgagor, Trinity Buildings Corporation and, in fact, the plan submitted by the guarantor contemplates an application in the New York State Supreme Court for a reorganization of that mortgage under the so called Burchill Act. As I read the plan of the debtor in this present proceeding, it is built around the assumption that there will be certain provisions in the plan that the State Supreme Court will finally evolve in the Burchill Act proceeding in respect to this mortgage made by the Trinity Buildings Corporation.

I think we might be doing a futile thing, or something that we would have to revise and do over again, if we were to conclude this proceeding. Mr. Marx, before you concluded a proceeding in the State Supreme Court for the Trinity Buildings Corporation under the Burchill Act. I am afraid, if we were to take a definite stand, and we would have to in evolving all the terms of the plan in this court, if we were to take a certain definite stand in respect to what should go in a plan of reorganization of the mortgage itself under the Burchill Act proceeding, the State Supreme Court might resent that, and all of that, I think, affects the question of the workability of this plan. How can I hold that the plan is workable unless I shut my eyes to the fact that it is a plan, the workability of which is contingent upon what will be done in the State Supreme Court proceeding? That is as I see it now, but you may convince me otherwise in a brief. However, this is just a statement by the Court, with all the evidence in, as to the reaction that it feels with respect to the points that have been raised in this hearing.

On the question of what is fair and equitable, I feel that

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some of the contentions made by these committees as to further provisions for the security of the certificateholders have some real basis. Amendments may be necessary to the plan in order to see to it that if any income is received in any year that would exceed the height of the dam of the interest that is payable, so that there will be something going over the spillway, well, these certificateholders want to be sure that whatever goes over the spillway will be impounded for them in some way or other, so that all the net income of the two buildings will surely go to them and may not be siphoned off by the debtor, in this proceeding, the United States Realty & Improvement Company.

Then the question of this \$50,000 item, whether that is necessary, and if it is not used, for what purpose it may then be applied. Should it go as additional interest? Should it be made part of a sinking fund, as the plan contemplates? Those are other phases of the plan that we might consider on the question of what is fair and equitable.

Of course, we all know that there is hardly any plan that is ever offered in these reorganization proceedings where it is not announced that some way is going to be found of further strengthening that plan for the protection of those who, after all, as the courts have held, really own the property, that is, the certificateholders of the mortgage, and they have the first lien on the property and it is really their property in fact, although technically the title is, in this case, in the Trinity Buildings Corporation.

That is the way the matter shapes up in my mind. I may not have covered all the points. If counsel think there are other points that should also be discussed in the case, I will hear them now.

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16 Mr. Bardusch: I would like to cover in the brief the additional points that were raised in our objections, on which your Honor has not touched. We feel very strongly on this question of the duration of the extension, always keeping in mind that this is not a refinancing. There is no refinancing here. They are just taking time. We do not think that under these conditions, in view of their very testimony the other day, they can see ten years ahead. Why should we be bound ten years under this plan? I think five is enough, and that cannot inconvenience anybody.

17 There is another thing I did not want to bring up. I admit, the informality of these proceedings rather puzzled me, to know when I can say something

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8 It may be addressed to the motion, which I understand will be made to close the hearing, but this thought has occurred to me, that, considering the statements of this plan, the balance sheets annexed to this plan, and the variance between those and the proof adduced by the debtor here the other day, which showed this debtor to be, well, let us say, just on the brink of insolvency, without even considering any liability contingent on this debt, that before the acceptances are finally concluded and accepted here, that an order of this Court should be made directing a further notice to be prepared under the supervision of this Court bringing to the attention of all assenting bondholders what has transpired, and I am referring particularly to the effect of their financial—

The Court: Why don't you leave something to the Court? After all, I am going to consider the evidence.

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Mr. Bardusch: I was going to make a motion that a notice should go out.

The Court: No. I do not think it is necessary at all. We would never get through with notices.

Mr. Bardusch: There is that possibility—

The Court: Every time a new acceptance came in we would have to send out a new notice to all the certificate-holders as one grand jury to consider it. No, you may make to the Court any observations based on the proof, and I will act for the certificateholders. Don't worry about that.

Mr. Bardusch: That is one of the points. I will make it and put it in the brief.

The Court: Mr. Rickaby?

Mr. Rickaby: I have nothing further to say.

Mr. Arkush: I just want to bring out this point; It seems to me, for purely technical reasons, the meeting ought to be kept open. There may be something that should be done at the meeting. I have in mind specifically the suggestion I made as to the election of a committee, which might be considered useful at some later date, and I merely suggest, as a matter of convenience, that the meeting be kept open.

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The Court: I think our greatest difficulty will be in determining the time when the decision should be made, whether or not this matter should be decided before you go on with your State court proceeding under the Burchill Act. I always like to put myself in the other man's place, and if I were sitting over there, of course, and something like that came from here, I might just say, "Well, what are they trying to do, hobble me? Fix my gait?" We have to be a little bit practical about these things. And then too there is, of course, the possibility, even though a Judge might receive it with

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the best grace and not be offended by such course, he might think, "Well, I think from what I have here now, we should have this amount of interest fixed, and we should have this as reserve, and we should have this for the sinking fund, and something else, and the mortgage should be extended, not ten years, but five years or seven years." It might be the safer course would be to keep this matter before the Court, keep it open, with the understanding that the Court would cooperate with the State Supreme Court. Give that a lot of thought.

(First Meeting of Creditors concluded.)

(Oral Argument of Counsel to be held on July 17, 1939, 2.00 p.m., Room 506.)

Hearing before Judge Leibell—July 20, 1939.**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.****Bankruptcy No. 74,023.****925**

[SAME TITLE]

Before :**HON. VINCENT L. LEIBELL,***District Judge.***New York, July 20, 1939, 2.00 p.m.****(Hearing set for July 17th, 1939, further adjourned to this date.)****926****A P P E A R A N C E S :****WHITE & CASE, Esqrs.,****Attorneys for the Debtor;****Joseph M. Hartfield, Esq.,****Joseph A. Bennett, Esq., and****Henry M. Marx, Esq., of Counsel.****WILLIAM E. BARDUSCH, Esq., and****HAROLD A. SCHEMINGER, Esq.,****Attorneys for Ralph W. Earl and****Donald M. Halsted, as members of****Bondholders Protective Committee.****927****SIMPSON, THACHER & BARTLETT, Esqrs.,****Attorneys for Bondholders Committee
of which James A. Beha is chairman;****Hamilton C. Rickaby, Esq., and****H. McAfee, Esq., of Counsel.**

Hearing before Judge Leibell—July 20, 1939.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage Certificate Holders.

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J. A. PANUCH, Esq.,

Attorney for Securities & Exchange Commission. Amicus Curiae;

George Zolotar, Esq., of Counsel.

The Court: Let us agree on the order in which I will hear the argument.

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Mr. Hartfield: I should think the first thing to be disposed of would be a motion made since our last hearing, a motion made by the Securities & Exchange Commission for leave to intervene, and another motion made by them for an order to dismiss the petition and to deny confirmation of the arrangement, and we would like to be heard briefly, your Honor, at the proper time in opposition to the application for leave to intervene.

The Court: I will hear the applicant first. I signed an order to show cause bringing on this motion.

Mr. Hartfield: Yes, sir, and we desire to file an answer to the motion for leave to intervene and an answer to the motion to dismiss the proceedings.

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Mr. Panuch: At the outset we are ready to concede that there is no statutory authority under Chapter XI for intervention, nor do we rely upon any such authority.

The situation here which prompts us to intervene is simply this, we believe, and this is probably a part of our main argument for dismissal of these proceedings, that this petition is improperly filed under Chapter XI; that Congress

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enacted two separate and mutually exclusive procedures for corporate rehabilitation, one for the small fry corporations wherein there is no public interest, and Chapter XI, which constituted simply a rewrite of the old Section 74 and Section 12, the old composition procedure; that they very carefully set up certain machinery under Chapter X to apply to reorganizations wherein there was a public interest, to corporations which had securities outstanding in the hands of the public. You remember—

The Court: You would be a proper party to that proceeding, would you not?

Mr. Panuch: Yes, we would be; this being a case where there are more than three million dollars of liabilities, there would be a mandatory reference of the plan to us for report. The fact that this proceeding is, which in our judgment is a jurisdictional error, brought under Chapter XI on an improper theory, to put it charitably, deprives us of the duty which we would have under Chapter X, and that is to report, and the right to intervene and participate in the proceedings in the public interest.

The Court: The point is, then, is there discretion in the court to permit intervention.

Mr. Panuch: That is it, whether there is discretion in the court under its inherent power to permit us to intervene in the public interest and, in that connection, I would like to call your attention to the case of—

The Court: The intervenor must have some interest.

Mr. Panuch: Yes, sir.

The Court: Is the public interest of a public group of officials sufficient or does that mean a financial interest?

Mr. Panuch: I submit to your Honor the case of New

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34 York v. New Jersey, 256 U. S. 296, where they permitted the Attorney General of the United States to intervene in a cause of action involving a controversy over the disposal of sewage between the two States, New York and New Jersey. That is quite obviously of public interest. Also, under Rule 24 of the Rules of Civil Procedure, United States District Courts, Subdivision A-2: "When the representation of the"—

The Court: Wait, until I find that. You mean the general rules for this court?

35 Mr. Panuch: Yes, sir, the Rules of Civil Procedure of the District Courts of the United States. Rule 24, dealing with intervention generally; it says there, your Honor, you will note, "Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Quite obviously we have an interest in this respect, in that we would certainly be bound by the decree here and that we could not avoid the adverse effect of an adverse precedent in a matter of great importance so far as public interest is concerned.

36 The Court: As I recall it, referring to 81-A, subdivision 1, there was an order of the United States Supreme Court making these Federal Rules of Civil Procedure applicable to proceedings in bankruptcy.

Mr. Rickaby: That is correct, your Honor.

The Court: So we have the right to consider that.

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Mr. Panuch: Yes, sir.

The Court: And recently they also made a similar rule in reference to proceedings under the Copyright Act, effective September 1st.

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You may proceed.

Mr. Panuch: That, briefly, Your Honor, is our position upon the right of the Commission to intervene in this proceeding. Of course the motion to dismiss simply is a logical consequence of a position we would take dependent upon the exercise of your discretion as to the permission to intervene here.

The motion to dismiss raises the questions against confirmation and, I believe that from the standpoint of orderly procedure probably Col. Hartfield should argue in support of the confirmation and then we would raise those things in proper order, if that is agreeable to Your Honor, because otherwise I would have to go into my main argument.

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The Court: As I see it, the point is whether the fact is that the Securities & Exchange Commission would be a necessary party in a proceeding under Chapter X if this case had been instituted under Chapter X, and we now have a proceeding under Chapter XI, which they claim should have been instituted under Chapter X. Does that give them such interest in the proceeding under Chapter XI that they should be permitted to intervene? You can see where they are affected by this proceeding. If the proceeding is not properly brought under this chapter, then it would have to be instituted under Chapter X. However, in Chapter X they would be a necessary party.

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Now, Colonel, tell us why they haven't an interest therefore.

940 Mr. Hartfield: Your Honor understands this is a bankruptcy proceeding, which is a statutory proceeding. You also understand that the Securities & Exchange Commission is a statutory body and its rights must be found in the statute, and the jurisdiction of this court, in a bankruptcy action, is found in the Bankruptcy Act. I do not think that the attorney for the other side disputes the proposition that the general rule is that a person not a party to a suit cannot be heard in it and attempt to defend against except on the ground he is a party who has an interest in the results of the litigation of a direct and immediate character.

941 It seems to me the test you have to make here is, has the Securities and Exchange Commission an interest of a direct and immediate character in this Chapter XI proceeding? Because until this court determines that this is not a proper case under Chapter XI, the only thing before you is this Chapter XI proceeding. It seems to me that his admission absolutely determines this motion. He admits that under the provisions of Chapter XI there is no statutory authority for the Securities & Exchange Commission to appear in this proceeding. He admits even that certainly there are no broad equitable powers of this court, if it is a proper Chapter XI proceeding; that you could not under any general equity or broad powers admit the Securities & Exchange Commission.

942 The Court: But as a friend of the court?

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Mr. Hartfield: You might have him as a friend of the court, but that is not what he is asking for. He is asking for leave to intervene and to be made a party to this proceeding, and we deny either that he has authority to ask for such right or that this court has jurisdiction.

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Your Honor will recall that we did not object at the previous hearing to your hearing from him, to your taking a memorandum from him, on the question of whether or not this was a proper proceeding under Chapter XI, and we do not now, but what he is asking Your Honor to do is to determine that, not because Congress wrote it in under Chapter XI, but because he claims this is not a proper proceeding under Chapter XI, and in advance of your determination that it is not a proper proceeding under Chapter XI, you shall make him a party in here, not as a friend of the court, not as a party here by courtesy of the court, not hearing anything he had to say because he represents an important branch of statutory government, but because he is asking you to enter a decree, an order, determining that he is a proper party and that he has a direct interest in this Chapter XI proceeding.

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He admits at the very outset that there is no statute that gives that authority and his only claim to any such interest is that because if this was a Chapter X proceeding, he would have a right and therefore Your Honor ought to, under some exercise of some general equitable rights, say that Congress intended to write in the statute, although it did not, that if the Securities & Exchange Commission comes

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into a Chapter XI proceeding and claims it ought to have been a Chapter X, this court has jurisdiction to make them a party.

The Court: Just a minute. If the court were to find the proceeding should have been brought under Chapter X—

Mr. Hartfield: You will dismiss this proceeding.

The Court: Then it will be proper for me to permit him to intervene.

Mr. Hartfield: No.

The Court: It would not be necessary.

Mr. Hartfield: No, you will dismiss the proceeding.

The Court: But while that is an issue in the case, hasn't he an interest?

Mr. Hartfield: Absolutely not, because he can only have an interest if it is given to him by statute, and he admits there isn't any statute giving it to him.

The Federal Trade Commission made a somewhat similar observation, wherein Judge Sutherland said that it is a necessary implication of the grant of power that if broader powers be desirable, they must be conferred by Congress; they cannot be created by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions.

The Court: Was that an application for leave to intervene in a proceeding?

Mr. Hartfield: That was a case where there was a complaint by the Federal Trade Commission, charging unfair method of competition, and the court held that the Federal Trade Commission was without jurisdiction to make a cease and desist order in

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the absence of a finding, you know, one of the findings of the statute. It was not an application for leave to intervene, but there is another case, your Honor, where the Interstate Commerce Commission was held not to have jurisdiction, where they claimed in certain other cases they would have had jurisdiction, you know, if they had been under—

The Court: This is not a case claiming jurisdiction. They are making a claim for the right to intervene, that is, to be heard as a party.

Mr. Hartfield: Yes, to be made a party.

The Court: Not as a friend of the court, and, of course, they would have certain advantages in that; they would have a right of appeal.

Mr. Hartfield: Even under Chapter X they do not have a right of appeal.

The Court: Oh, yes, they would have a right of appeal here.

Mr. Hartfield: No, even if it were under Chapter X.

The Court: Anybody who is granted leave to intervene has the right to appeal.

Mr. Hartfield: But the Securities & Exchange Commission by the very words of the statute is limited. So it does not have that right under Chapter X.

The Court: If they are granted leave under Section 24, they will have.

Mr. Hartfield: If the court can find any authority for saying "I am letting them in, not under the statute, but on some general grounds," I suppose they would have a right to appeal too under Chapter X. Where it was purely statutory they certainly would

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have no right to appeal. I will stake my professional reputation on the meaning of that statute.

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Mr. Panuch: Your Honor, you have heard a good deal about the elements of fairness, the equitable character of the plan, feasibility. We argue that to some extent except that we have a shift in emphasis. In other words, our primary concern here is not with the fairness of this plan or whether it is equitable or feasible. If it were properly under the statute we would not be here.

We say that the plan here is manifestly inequitable, not feasible and not fair because the machinery provided by Congress for corporate reorganizations involving publicly held securities has been evaded. This debtor is here on a technical construction of the statute on the theory that it is seeking an arrangement of its obligations. Realistically viewed, you have a reorganization of two elements of the same enterprise, Trinity Buildings and Realty.

The question comes down to one of Congressional intent. I think the cases are clear that a matter of this character, even though it comes within the literal meaning of the statute, if it is not within the intent of Congress, it is within the power of the court to decline jurisdiction. In that respect I call your attention to the Church of the Holy Trinity case, which you have read, and also to the American Security case, where Mr. Justice Holmes says, and this is right in line with our argument, "If, then, the words have the meaning given them by the applicants

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the jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result."

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To get back to the legislative history, I think it is quite clear that Chapter XI is nothing but a rewrite of the old composition procedure and we know what the composition procedure is. I do not want to stress that today. I want to direct attention to what Congress had in mind with respect to reorganizations of corporations having publicly held securities. As you will remember, the old abuses under the 77B proceeding were really three: the court did not have adequate control over the reorganization process. That was number one. Two, the security holders had very limited participation in the proceeding. In other words, they had the right to be heard on two specific things and that was all. After that they had to appeal to the court's discretion through a committee and then the committee that got in foreclosed the others, and you had a situation where the committee that got in first got representation and got money and there was no representation for anybody else. The third and the most important abuse of the old 77B proceeding was this: the courts had the duty of finding that a plan of reorganization was fair, equitable and feasible; they had the duty all right but they had no machinery whereby an informed finding of that character could be made.

In enacting Chapter X, Congress on the basis of a four-year study, after committee investigation, de-

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vised Chapter X and that addressed itself to these deficiencies of 77B. First of all, they struck at the abuse of the management sponsoring a reorganization. They provided in each case with over \$250,000 in debts, and this is important machinery, there should be an independent trustee, with certain qualifications of disinterestedness set out in the act.

The Court: Under the old section, 77B, we generally provided for some supervision of that kind by having an accountant in there countersigning checks, and some committee of merchandise creditors supervising the purchase of new materials. It was difficult, there is no question about that, but that was more a matter of management of the business.

Mr. Panuch: That is right.

The Court: If you wanted to be sure the business was properly and honestly managed, and the assets conserved, you would take those various means, not mentioned in the section at all, and adopt them in order to protect the court while the reorganization was going on. As far as committees are concerned, what we did was this, as soon as any committee could show it represented a substantial interest, even though there may have been another committee in first that had been permitted to intervene, the general practice was to permit both committees to come in.

Mr. Panuch: That may be so, and I have practiced reorganization around here a very long time, and my experience has been that once a committee got in, it was awfully hard for anybody else to get in because then you simply made that argument of duplicating work and duplicating fees.

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The Court: If it was a question of simply somebody connected with a law firm, or a client had some bonds and organized a committee and the lawyers came in to represent it, why naturally that was brushed aside. They would be heard but they would not be permitted to intervene. We heard everybody. Single bondholders came in and they were heard. But, at any rate, under Chapter X they did assume to properly supervise—

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Mr. Panuch: You mean under 77B?

The Court: No, under new Chapter X, they attempted to control the organization of these committees, to be sure they would be fully representative of certificate holders, bondholders or whomever they attempted to represent.

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Mr. Panuch: Getting back to the independent trustee and the mechanics of finding out what made the corporation tick and what made it fall, the independent trustee has very broad powers and very broad duties. He makes a thoroughgoing investigation of the condition of the management of the business and of the feasibility and desirability of reorganization. You get an unbiased opinion, and an investigation by somebody in whom the court has confidence, and a competent person who can get right to the guts of the failure of the debtor and come out with the answer. To get to the point, as you pointed out in the old story, stockholders, indenture trustees and creditors had a right to be heard but that was a very limited right. Now everybody, stockholders, indenture trustees, certificate holders, have a right to be heard and to be heard through committees. That makes the participation through committees of certificate holders

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of the very broadest character. The trustee has to file a report and he has to file that report so that creditors and stockholders will know the whole story, and I think one classic example of that is the report which has been distributed to stockholders by Mr. Wardall, in the McKesson & Robbins matter, one of the best I have seen in a complex reorganization.

The committees, as you point out, under Chapter X are controlled by the provisions of Sections 210 and 211. So you have that protection. In cases where liabilities are over three million dollars, it becomes a question of a mandatory reference to the Securities and Exchange Commission for report on the merits of the plan or plans that may be filed prior to that principal hearing on the plan, and the security holders can propose amendments or counter proposals.

If the judge thinks this plan or the other plan worthy of consideration, he sends it to the S. E. C. and we consider two things, fairness and feasibility, and we report on that. Then on the basis of all these proceedings the trustee reports on figures and recommendations as to whether plenary suits should be brought against the manager for past acts of waste or past acts of incompetence or past losses. Then when you get to that point and you make your finding that a plan is fair, equitable and feasible, you have something developed with the assistance of somebody who is absolutely disinterested and with the cooperation of an agency which has no axe to grind and working for the public interest. That is the machinery set up to enable the court to make a finding on a plan as to fairness, feasibility and equitableness, and up

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to that point nobody is permitted, except in most unusual circumstances, to solicit any assents to the plan or to attempt to have stockholders or the security holders or anybody commit themselves in any way for one plan or the other. You have no such machinery that under Chapter XI. That was clearly evident at the very last hearing, day before last, when these committees here tried to intervene, just a question of a few creditors making a deal for approval. This court as a routine matter makes a finding that the plan is fair and feasible—

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The Court: That is why I studied it. Not as a routine matter:

Mr. Panuch: I mean nothing invidious by that.

The Court: I just wanted to set you straight on that.

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Mr. Panuch: Necessarily you do not have the machinery, because obviously it is a matter of agreement which is submitted to you and you make your findings but you do not have the machinery which is set up under Chapter X.

The Court: Don't I have the testimony that we had at the last hearing? Didn't we have the testimony of one of the officers of the corporation?

Mr. Panuch: He testified as to a balance sheet.

The Court: With the right of cross-examination, at least two of the committees did cross-examine, and I think counsel representing some bondholders, I permitted him to ask some questions. You may be right in saying there may be more and better machinery available in Chapter X, but that does not mean that a judge hearing a proceeding

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under Chapter XI acts blindly or gropes in the dark or guesses what the answer should be. He seeks all the light he can get and he gets it in the sworn testimony under the procedure outlined in Chapter XI. That is the reason why, in this proceeding too I permitted the three committees, all of which represent substantial interests, to intervene, but I permitted you to come in here as a friend of the court. The point in which I am interested is, you argue that this is a case of first impression that the court should rule on the question of whether this proceeding should be instituted under Chapter X instead of Chapter XI.

Mr. Panuch: Correct.

The Court: Not so much because of the fact that they do not technically come under Chapter XI, if you give the words that ordinary meaning, but because of the Congressional intent.

Mr. Panuch: Precisely.

The Court: In the case of some minister who had been called to serve in the pulpit in the United States from one of the countries abroad there was a very strained effort to apply the statute, there is no doubt about that. That, I think, is your main point. On the feasibility of course that I do not dispose of until I dispose of this other point, whether we retain jurisdiction.

Mr. Panuch: That is it. And when it comes to the question of feasibility, we urge or we present to the Court some of the points which counsel have made—

The Court: Some of the points which counsel have made, you may have made them first the other day.

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but they have them in their briefs, too, as to the provisions of the plan itself.

Mr. Panuch: Yes, sir.

The Court: But your principal argument is, you think this court should not assume jurisdiction in this matter because it was not the intent of Congress that Chapter XI should apply to a case of this kind.

Mr. Panuch: Because this is a case of a corporation with publicly held securities.

The Court: Can't you imagine a corporation say of fair size—after all, what is large and what is small is a matter of comparison. They are terms of comparison, aren't they?

Mr. Panuch: That is right.

The Court: It depends by what standard you measure them. If you take them by the size of General Motors Corporation as meaning a large corporation, then this is a very small corporation. Taking the size of some corporation that owns a piece, or two or three pieces of real estate as a large corporation, why then this would be classified as a large corporation, but couldn't you imagine, couldn't you properly suppose, because we are an average size corporation, finding that as to its secured debt it was all right, did not need to reorganize that, the obligations were not yet due, we will say, the company was in shape to meet them, the fixed carrying charges could be met, but this corporation got itself into a condition where it had to go to the bank, we will say, and was fortunate enough to persuade the bank to lend some money without security, after using all the persuasive powers at hand, and they probably

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would be great, if they could get money without security, and then the bank said, "Now we want to be paid." Now, is it your idea that the corporation, in order to reorganize its unsecured debt, would be obliged to go into Chapter X? Would that be necessary because it had other securities, we will say, outstanding obligations, some of them held by the public, yes, many of them, yes we will assume all of them held by the public?

Mr. Panuch: What you describe there is an overgrown composition. They are in trouble with a few creditors and they go to the bank. We are not talking about that.

The Court: No, no. Say they have a number of merchandise creditors, is it your idea that Chapter XI would not apply to a situation where the debtor has securities which are publicly held?

Mr. Panuch: Judge, we claim this—

The Court: No, no. I am just wondering what your reaction would be. What would that corporation have to do? Would it have to have an involuntary bankruptcy? Would there be no form of reorganization available to it unless it were a complete reorganization, taking care of something that did not need to be reorganized, secured debts that were all right, just because it was in a position where its unsecured debts did require reorganization?

Mr. Panuch: Well, if they were publicly held securities, I think what you mean by reorganization of an unsecured debt means that some unsecured creditors are going to be shaken down and the stock is going to stay in as is. That is fairness.

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The Court: That is fairness.

Mr. Panuch: Yes.

The Court: There is something different between jurisdictional argument and an argument, if you have jurisdiction and you pass on the fairness of it. That will be carefully examined.

Mr. Panuch: May I ask you to clarify your question in my mind?

The Court: Yes.

Mr. Panuch: Are these securities you are talking about, that you are going to reorganize, in your case, are they publicly held securities?

The Court: Yes.

Mr. Panuch: Then absolutely, yes.

The Court: We take it first in the case where they are not publicly held. We will say a man has a score of merchandise creditors and, say, three or four banks.

Mr. Panuch: That is Mr. Hartfield's case, Chapter XI.

The Court: Let us suppose, instead of that, that they had sold debentures unsecured to the public and they had half a million of those outstanding and they fall due and they are not in position to pay the full amount, their secured indebtedness is all right, is not pressing, would they have to take the complete plunge?

Mr. Panuch: Yes.

The Court: Pass under Chapter X? Or could they reorganize under Chapter XI?

Mr. Panuch: Chapter X.

The Court: Why X and not XI? Just because the secured obligation was publicly held?

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Mr. Panuch: Yes, sir.

The Court: Where is that in there?

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Mr. Panuch: That is the argument I meant, that there is this entirely different machinery for the two different types of reorganizations, with the two separate forms of machinery, that Congress so laboriously spelled out. They must have some meaning and they do not have meaning unless Chapter X applies to publicly held securities corporations.

The Court: Isn't the difference between Chapters X and XI really this, that under Chapter XI you may reorganize unsecured debts and you cannot reorganize secured debts?

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Mr. Panuch: Your Honor, it is not as simple as that.

The Court: I may be a little bit dense, but I was just wondering whether the wording of Chapters X and XI would not so indicate, that there is no provision in Chapter XI for reorganizing secured debts, only unsecured, but there is a provision for reorganizing both secured and unsecured debts in Chapter X. Is that the distinction between the two chapters?

Mr. Panuch: That is one of the distinctions.

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The Court: Now show me that in the chapters, that I may see it, because it is in the Act and you can spell it out from the wording of the Act. Now show me the other distinction, namely, that under Chapter XI there is attached to the term "unsecured debts" the further qualifying phrase or clause "unsecured debts" we will say "unsecured obligations," not publicly held.

Mr. Panuch: That I cannot show you. I am arguing the intent of the statute from the framework of the statute.

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The Court: Is that the point in your opinion, or the point of your argument, that you claim that the intent of Congress is that Chapter XI should not apply to unsecured debts where those obligations of the debtor were publicly held? 985

Mr. Panuch: Well, that is part of it. We go much further than that.

The Court: If you can back that up with the citations from the Congressional reports, or something to show that why I want to give it thorough consideration.

Mr. Panuch: We say, your Honor, that Chapter X set up the machinery, it is a matter of legislative history, for the reorganization of corporations of large magnitude, big league corporations.

The Court: I agree that is where most of them would go, especially where they wanted to reorganize secured obligations, but, I say, are they barred from coming in under Chapter XI where all they wish to reorganize is their unsecured obligations? That is the nub of the argument, as I see it. That is the whole case. 986

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Mr. Panuch: Does your Honor have the House report to which we make reference continuously in our brief? I would like to give it to you.

The Court: If I haven't it, I can get it, or if you have an extra copy, you may send it to me.

Mr. Panuch: I will send it to you. That covers public investor interests. 987

The Court: This bill originated in the House. Congressman Chandler gave his name to it. He was one of the most active men in this legislation and his name would quite naturally attach to it. The report of the House Committee

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was the main report. What about the Senate? Was there an additional report there, that covered other points than covered in the House report?

Mr. Scheminger: Yes, I believe two.

The Court: What is in the Senate report on this subject we have been discussing?

Mr. Zolotar: All through the reports, your Honor, there are references to the fact that such and such a provision was designed to protect the investor interest in a corporation. The term has a definite meaning in all the actions in which the Securities and Exchange Commission has participated. It means securities publicly held by public investors. I have not had an opportunity to go through all of it, to give you all the provisions, but in the Senate report it says, in cases where the fixed indebtedness of a corporation is less than \$250,000 no substantial investor interest is usually present, and in such case the court may appoint a disinterested trustee, but it says in other cases, where there is a substantial investor interest, the court shall appoint a disinterested trustee. Examples of that kind appear throughout the report, and if your Honor would care to have them, we shall mark them out.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Bankruptcy No. 74,023.

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 [SAME TITLE]

Before:

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 27, 1939, 12 noon.

APPEARANCES:

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WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Joseph A. Bennett, Esq., and

Henry M. Marx, Esq., of Counsel.

WILLIAM E. BARDUSCH, Esq., and

HAROLD A. SCHEMINGER, Esq.,

Attorneys for Ralph W. Earl and

Donald M. Halsted, as members

of Bondholders Protective Committee.

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SIMPSON, THACHER & BARTLETT, Esqrs.,

Attorneys for Bondholders Committee

of which James A. Beha is chairman;

Hamilton C. Rickaby, Esq., and

H. McAfee, Esq., of Counsel.

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I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a creditor;
Aaron Holman, Esq., of Counsel.

J. A. PANUCH, Esq.,

Attorney for Securities and Exchange
Commission, Amicus Curiae.

George Zolotar, Esq., and
Marland Gale, Esq., of Counsel.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage Certificate-
holders.

McLANAHAN, MERRIT & INGRAHAM, Esqrs.,

Attorneys for a group of bondholders;
Scott McLanahan, Esq. and
Robert T. Crane, Esq., of Counsel.

* * * * *

Mr. McLanahan: I am appearing in this hearing for the first time.

The Court: For whom?

Mr. McLanahan: For a group of bondholders who have heretofore not been represented.

The Court: Who are they?

Mr. McLanahan: I have a list of them here. They hold a million and a half to two million of the bonds.

The Court: Have they already signed or consented?

Mr. McLanahan: They have assented to the plan. This group representing a majority of the bonds had negotiations with the debtor, the owner company and the Realty Company, and the trustee, this spring, and they worked out this

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plan with several modifications later agreed to, and finally all of them agreed that it was the best plan from their standpoint and they were satisfied with it and they went their various ways and filed their assents. They thought it was not necessary for them to be represented in this proceeding. Of course there I think they were very much mistaken. But it is a fact that these large institutions who hold bonds in the amounts of \$25,000 on up to \$400,000, feel that this plan is fair, equitable and feasible. They are anxious to have the plan consummated. Unfortunately, as I say, they did not retain counsel to represent them until yesterday. We understood that a meeting was to be held yesterday afternoon and participated in to the extent of listening to the various suggestions. No agreement or understanding was reached. There are conflicting views and opinions and proposals, and it is important for our clients, the large holders, that they now have a voice in the matter, and I have inquired and find that apparently no possible harm or loss can result from some further delay to give us an opportunity of continuing these discussions to compose the differences and possibly agree on a plan.

The debtor, I understand, is willing to make further concessions. How far has not yet been definitely determined as I understand it. Naturally we are anxious to get all the concessions we can—all the additional advantages we can, but it is the definite position of these large holders that they do not want to have to be compelled to take over this realty and operate it themselves. Therefore they are anxious to preserve the guarantee. I believe that some of the others feel the same way. I am informed that one or two would be willing—

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The Court: Who? Let them stand up and speak now.

Mr. Arkush: What is the question? I don't think it was quite clear.

The Court: I thought you were following the argument.

000 Mr. Arkush: Are you calling for the lawyers of the committees to stand up who want to take over the property?

The Court: No, those who are against taking over the property.

Mr. Arkush: The Peter Grimm committee is against taking over the property and we are in favor of the plan, although as Mr. McLanahan said, we also would like to get further concessions if they are offered.

The Court: What about you?

001 Mr. Scheminger: The position of the Earl Committee is this: they do not object to taking over the building but they have suggested and ask for certain modifications of the plan in preference to taking over the building. We are not taking the position that we do not want to take the building, but there are things that we would prefer to do before we take it over.

The Court: What does your committee say?

Mr. Rickaby: We are practically ready to take the building. We feel that there must be something new put into this picture by this debtor before they can be relieved of their obligation. We believe the law is clear. I have and we are perfectly willing to stand on the legal position. We don't say that we won't be glad to sit in to see if anything further can be done.

002 The Court: Go ahead, Mr. McLanahan.

Mr. McLanahan: What I would like to ask for, if your Honor please, is that this hearing be put over to give us ample time, in fact until after Labor Day. I understand

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the assets are being taken care of and are being segregated; that accounts are being rendered to the trustee every week, and that no possible harm can result by a few weeks' further delay. I believe except for the last position which was expressed that the other creditors have pretty much the same point of view and possibly we can get together on an adjustment of the difficulties.

The Court: But the point in the case that I see that makes the plan not feasible is that you are attempting to reorganize here the guarantee before you start a proceeding in the State court to reorganize the mortgage indebtedness under the Burchill Act. I don't think that either of those two proceedings in two separate courts can be driven as a tandem. You can drive them as a team, they can both go together but I don't think one should be ahead of the other. I think that is a basic fault in the plan.

Now, of course, there are other provisions in the plan as I indicated yesterday when some of the attorneys came up to chambers in connection with a motion that had been referred to me in this matter, that are subject to criticism. I think that many of the criticisms of the creditors concerning other features of the plan are well founded. But as the matter shapes itself in my mind I think that these creditors, these certificate holders who are asked to reorganize the guaranty are entitled to know what is going to be done with the principal indebtedness of the mortgagor before they are called upon to assent to any plan for reorganization of the guaranty. I think that is what is basically wrong with the plan. I feel that we might be doing something that would be misconstrued in the State courts as an attempt to foreclose their own independent judgment in the matter. I feel also that if we were to reorganize the guaranty here on certain

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terms that the State court might reorganize the principal indebtedness of the mortgagor on different terms and we would not have here a plan that would be consistent with and therefore feasible and workable with the other plan.

That is what I think is wrong. I don't think any patch-work amendments to the present plan are going to change that. It can't. I think you have to start all over again. That is my opinion, that there should be a new plan that would be considered concurrently by the two courts, a plan for the reorganization of the mortgage under the Burchill Act and a plan for the reorganization of the guaranty under Chapter XI.

Counsel, you don't mind if I interrupt you to stress these views?

Mr. McLanahan: Not at all.

The Court: Because my views are always subject to correction if anyone shows me I am wrong. Suppose you take your seat a minute and I will get on the record now what has finally crystallized as my view of the whole situation.

I think that the motion of the Securities and Exchange Commission for leave to intervene for the limited purpose of asserting that this proceeding should be brought under Chapter X instead of Chapter XI should be granted under Rule 24 of the Federal Rules of Civil Procedure. That is sufficient interest to permit the granting of their motion.

I have considered the motion that they have made for a dismissal of the proceeding principally on the ground that in the opinion of the Securities and Exchange Commission this proceeding should have been instituted under Chapter X instead of Chapter XI, and I have heard the arguments that they have presented. I have consulted the various parts of the reports of the Congressional Committee which considered

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the Chandler Act and this particular feature of the Chandler Act, which is included in the McAdoo report of 1936, and I have come to the conclusion that this particular proceeding may be instituted under Chapter XI of the Chandler Act.

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Now I will hear you.

Mr. Zolotar: This motion that we made for dismissal was a formal motion simply stating our grounds.

The Court: Wasn't that your sole ground, counsel? That was your main ground.

Mr. Zolotar: I am talking about the formal paper we handed up and which was returnable on July 20th. That particular motion was not verified because we didn't think it was necessary to verify it. It contained no facts.

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The Court: It may be, counsellor, that you could not make it until you were first permitted to intervene. But I considered the arguments presented, the arguments in your brief.

Mr. Zolotar: I am not appearing to talk about the arguments as to the merits of the application. I simply wish to point out that the answer of the debtor raised the objection that that particular motion was not verified. We thought that to make the record completely correct we might submit now an amended motion which would contain a verification. And I simply wanted to introduce that.

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The Court: You mean to meet that technical objection.

Mr. Zolotar: That is right.

The Court: You may present the verification.

Mr. Marx: Is that the same motion?

Mr. Zolotar: Exactly the same.

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Mr. Marx: In other words, we need file no further answer.

The Court: No. The answer heretofore filed shall be considered as filed in respect to this motion. Why do you press that?

Mr. Marx: I don't press it.

The Court: Do you withdraw it?

Mr. Marx: Yes.

The Court: Then we don't need this.

Mr. Zolotar: Thank you, your Honor.

The Court: Now I am of the opinion that in these Chapter XI proceedings, whether or not they are proceedings involving small corporations or large corporations, the size of the corporation is of no moment. If Congress had intended that these proceedings should be limited to small corporations so-called, I think Congress would have fixed some definite limitation in the Act for the guidance of the court and the litigants. However, so that there may be no question about this particular point and the effect of this decision on other cases that may be presented, I feel that for that reason also the Securities and Exchange Commission should be permitted to intervene for this limited purpose so that if it is not satisfied with the court's decision in relation to it, it may take an appeal and be heard in an appellate court. But the motion of the Securities and Exchange Commission to dismiss this proceeding on the ground it is not properly brought under Chapter XI in that according to the contention of the S. E. C., Chapter XI was not intended to cover a case of this kind, that motion is denied.

In respect to the plan itself, I find that this court has jurisdiction under Chapter XI. There are many provisions of the plan that I think should be amended in the interest of the certificate holders, but what those amendments should be I

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don't think we should determine now, because I hold that the plan is not a feasible plan in view of the fact that it is not brought on concurrently with a similar plan for the reorganization of the principal mortgage debt.

I don't think that much could be accomplished by just an amendment of the plan. I have before me the provisions of the statute in respect to the course the court must follow if it finds that the plan is not feasible and denies confirmation, as I intend to do in respect to this plan.

Did you wish to be heard on that, Mr. Marx?

Mr. Marx: Yes, your Honor. I wanted to point out in view of your opinion that that objection is insuperable, an amendment to the plan providing that the Burchill Act proceeding be brought simultaneously and forthwith would seem proper and as a matter of fact I understand that the Guaranty Trust Company of New York already has the complaint drafted. That would not be adverse to certificate holders and it might be proper to submit an amendment as to that.

The Court: Mr. Marx, did you give some thought to this too: the certificate holders should have another chance instead of the court determining whether or not the amendment is adverse, they should have another chance when this new plan is developed, this new arrangement—that is what it is in this court under Chapter XI—to consider that matter over again together with their consideration of the proceeding under the Burchill Act and the plan there offered?

Mr. Marx: You understand my worry here as to the delay and expense and the keeping of this thing up in the air that a new arrangement might cause rather than amending this one, which would seem to me to be perfectly feasible.

The Court: How much extra expense would there be?

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Mr. Marx: We have to formulate a new arrangement and get new acceptances again and that might be a long procedure. Some of the committees we may be able to get together with; with others I think we are as far apart as the poles, because the theories we are proceeding on are entirely opposed.

The Court: Well, Section 376, which is part of Chapter XI, provides that if the confirmation of the arrangement is refused, that the court shall, if the proceeding was instituted under Section 322, as this one was, among other things dismiss the proceeding under this chapter. It may either do that or adjudicate the debtor a bankrupt and the debtor in this case is not a bankrupt according to the testimony adduced here. So the only other alternative is to dismiss the proceeding under this chapter, and that has to be done on notice under subdivision 2 of Section 376. That reads as follows: "Where the petition was filed under Section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or"—and this is the one under which I would have to act—"or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

Mr. Arkush: There is the alternative proceeding under Section 364 where, if you fail to find "that the proposed alteration or modification does not materially and adversely affect the interest of any creditor who has not in writing assented thereto, the court shall adjourn the meeting, or, if closed, reopen the meeting and may enter an order that any creditor who accepted the arrangement and who fails to file

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with the court, within such time as shall be fixed in the order, his rejection of the altered or modified arrangement, shall be deemed to have accepted the alteration or modification and the arrangement so altered or modified, unless the previous acceptance provides otherwise."

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The Court: That is, the alteration or modification.

Mr. Arkush: That is what we propose, to try to see if we can agree on an alteration or modification, and then if your Honor feels that you do not want to accept the proposal in deciding that this alteration or modification does not materially or adversely affect the creditors, a short notice may be given under Section 364.

The Court: What do you think of that, Mr. Rickaby?

Mr. Rickaby: I have no objection to that as long as it is perfectly clear that the income from this property is segregated and put apart for the benefit of certificate holders, and I think it ought to be paid over to the trustee under the mortgage, the Guaranty Trust Company, reserving perhaps enough for ordinary operating expenses.

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The Court: Before I would even consider that I will say now, as I stated to the attorneys in chambers when they were up on those motions the other day, that I don't think it is right. It is not fair that these certificate holders should be without their interest that has been earned. It was earned and payable June 1st. You see, some of us may be very fortunate in that we don't have to worry about things like that if a dividend does not come in or if a payment is not met on an obligation. But to a good many of these people that may be a very serious thing, and I should think, counselor, that since you represent a good many of these institutions as trustee, that you would be very much interested in seeing that this interest was paid so that they could make disbursements to the beneficiaries of the trust.

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Mr. McLanahan: Yes, your Honor. I had a short conference with counsel for the debtor just before the hearing and I understand—I may be mistaken—but I was under the impression that it would be possible to arrange for the payment of that interest by August 10th, as I remember the date. Is that correct?

Mr. Marx: Yes. Mr. Flohr is here and he has the figures if you would like to examine them.

The Court: Yes.

Mr. Flohr: The earnings for the six months to June 1st are \$37,914.83 on account of interest.

The Court: You mean the net?

Mr. Flohr: The net earnings available for interest.

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The Court: What would that mean in the way of interest?

Mr. Flohr: It is about one per cent.

The Court: Is that all?

Mr. Flohr: Yes. You see, as trustee, in order for us to pay three per cent for this year the United States Realty & Improvement Company would have to advance—

The Court: Would they advance ordinary charges against the operating income of the building?

Mr. Flohr: Nothing.

The Court: What was the gross operating income?

Mr. Flohr: The gross income was \$439,000.

The Court: How did you spend it?

Mr. Flohr: Real estate taxes, \$163,000.

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The Court: What were they for?

Mr. Flohr: Real estate taxes for six months.

The Court: For the first six months?

Mr. Flohr: Well, they are actually accrued for these six months, which is not exactly a six months period.

The Court: You didn't pay the whole year?

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Mr. Flohr: No. We paid the first half.

The Court: You paid the first half?

Mr. Flohr: They don't actually figure out the same amount, but very very closely. \$174,000 in operating and maintenance expenses which includes payrolls and all other expenses.

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The Court: Have you a breakdown on that?

Mr. Flohr: I haven't it here.

Mr. Rickaby: How much to executives?

Mr. Flohr: Not over \$8,000.

The Court: You mean executives of the Trinity Buildings Corporation. Let us have that.

Mr. Flohr: Of anybody. Not over \$8,000. Repairs, \$37,000. Insurance, \$8,000. General and corporate expenses and other taxes, \$18,000. Which make a total of expenses of \$101,900 in round figures. Deducting that from the \$439,000 leaves the figure that I gave you before.

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The Court: Maintenance charges are as high as that?

Mr. Flohr: Yes, sir.

The Court: Just to operate the building for January, February, March, April and May, \$174,000.

Mr. Flohr: December, January, February, March, April and May.

The Court: I see, yes.

Mr. Marx: There are two buildings.

Mr. Flohr: They are both large buildings, of course. There are two.

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The Court: Are there any arrears of rents?

Mr. Flohr: There are some arrears but not a substantial amount.

The Court: Were any of the May rents paid after June

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1st that you haven't included in that?

Mr. Flohr: Not substantial. I couldn't say. There are some. I know there are some but they would not be a substantial amount.

The Court: Well, what do you mean by a substantial amount?

Mr. Flohr: They would not be \$5,000 I would say.

Mr. McLanahan: If your Honor please, do I understand that these monies are being held by the company there, or what is being done with them? Are they being conserved in any way?

Mr. Marx: Your Honor, I would like to read, to put on the record if you would like, a letter which was written on June 27th by Trinity Buildings Corporation of New York to the Guaranty Trust Company as mortgagee, which will settle this question:

"Gentlemen: Referring to the amended modification plan and arrangement of Trinity Buildings Corporation of New York, first mortgage 20-year 5½ per cent sinking fund gold loan due June 1, 1939, and guarantee thereof, this will advise that we have established a separate account in the Manufacturers Trust Company, in which there is a balance as of the close of business on June 24, 1939, of \$20,234. Such balance represents all rents collected commencing June 1, 1939, less all operating costs and other expenses of the corporation paid since that date."

The Court: What about what accumulated before that? That is the point.

Mr. Marx: What do you mean?

The Court: What about the rents, the net income of the building prior to June 1st? Those six months. Where is that?

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Mr. Marx: I want to show you that those are segregated and being held for their benefit.

The Court: Yes, presently.

Mr. Marx: I think there is another account which Trinity Buildings Corporation has which contains rents collected prior to June 1st, and I think there is some \$20,000.

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Mr. Flohr: \$23,000.

The Court: What do you mean by prior to June 1st?

Mr. Flohr: Well, our balance of June 1st, 1939, was \$23,000—the cash balance.

The Court: You mean the net?

Mr. Flohr: Money in the bank.

The Court: Of what?

Mr. Flohr: Of the Trinity Buildings Corporation. There was \$23,000 in the bank. That was after paying our taxes for the first half of the year.

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The Court: I thought you said there was \$37,000 balance.

Mr. Flohr: No, I said there were earnings for six months up to that time.

The Court: What became of the difference of \$14,000?

Mr. Flohr: Well, I would have to make an analysis of the accounts, but you must bear in mind that the interest that was paid even for the previous six months was not earned. So that it is quite possible that some of that money was used to pay a previous interest payment.

Mr. Marx: Your Honor, these books are kept on an accrual basis and not on a cash basis and certain of the expenses and charges are accrued and prepaid insurance and things like that are carried as an asset.

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The Court: What do you mean? They were used? Rents collected, for instance, in December, were used to pay the interest due on December 1st?

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Mr. Flohr: We borrowed some money from the bank in order to pay the interest due on December 1st and paid off the loan.

036 The Court: Why shouldn't that be paid over to the corporation? Wouldn't the guaranty cover that?

Mr. Flohr: I can't answer that.

Mr. Marx: Your Honor, the Trinity Buildings Corporation of New York last December in order to meet the interest requirement on these certificates borrowed money from the bank.

The Court: How much did it borrow?

Mr. Flohr: Well, to the best of my recollection it was \$20,000. I am not sure of that figure. It may have been \$15,000.

037 Mr. Marx: The bank was repaid through rents collected after December 1st. Now, if the guarantor had met that obligation, why the guarantor would have been repaid. He would have been subrogated to the rights of the certificate holders.

The Court: Then he would have been in court December 1st instead of June or May, whatever it was.

Mr. Marx: The certificate holders got one more interest coupon.

The Court: In other words, the guarantor has been repaid that money. That is the point, isn't it?

Mr. Marx: No, sir.

038 Mr. McLoughan: That is the effect of it.

The Court: Of course it is.

Mr. Marx: If the guarantor met his guarantee he would have been subrogated to the lien.

The Court: If he had attempted to exercise it things would have been forced to a head last January or Decem

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ber. I don't think you have a right to charge against the rentals for these six months what you borrowed from the net income for those six months in order to pay your interest due last December 1st.

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Mr. McLanahan: I don't know whether the debtor or at least the company is in a position to maintain its corporate existence—I imagine it is—without the use of the funds collected from these buildings. But certainly it should not apply any of the rents collected from these buildings while the interest is in default for the payment of any other expenses of that corporation. It should apply all these net rents it seems to me to the payment of the interest to the certificate holders. If it is of advantage to the certificate holders to keep the guarantor's corporate existence continuing, and if there are any direct benefits flowing from that to the certificate holders, why that is another matter. But it seems to me that the income from these properties should be applied to the payment of taxes and interest on the mortgage.

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The Court: And it should not have been used to reimburse the Realty Company for what it otherwise—at least to make good what the Realty Company should have made good under its guaranty in December. You see, it only goes to show how complicated this situation is. I really think that the proper course is for the Realty Company, the United States Realty Company, to reorganize all of this including its intercompany obligations, and the obligations of its subsidiaries under Chapter X.

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Mr. Rickaby: Absolutely.

The Court: You see, all of these things—you see this thing is an intercompany arrangement unfortunately. And under Chapter X you could have all of those things checked

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up and the rights of the various groups determined in respect to that income.

042 Mr. Marx: That is very true, your Honor, but the Realty Company feels that it can live if we can get an adjustment of this without the necessity of taking care of all the other securities.

Mr. Rickaby: Yes, chisel us and take care of the others.

The Court: Now wait a minute. There is another feature that you must give consideration to. There is the debenture holders secured by the G. A. F. Company stock, and they are getting six months—

Mr. Marx: They are selling for 25, and these bonds are selling for 44.

043 The Court: The point is this: if the rents of this property are being used to make good the obligation of the United States Realty Company under its guaranty indirectly—that is what it amounts to—while general income from the United States Realty Company, say, from its Whitehall Building, is being used to pay interest on these debentures secured by the G. A. F. stock, then those debentures are being preferred out of the general income over these certificate holders who have a claim under the guaranty, as I see it.

Mr. Flohr: Well, any interest that would have to be made good under our guaranty would come out of the general income of the United States Realty & Improvement Company.

044 The Court: You see, you haven't been taking it that way. You took it out of the next lot of rents and you borrowed money from the bank in the meantime. At least that was done last December. And then we find that the rents for the following six months are used to pay the interest that was due on the prior interest date. That is what it amounts to, doesn't it?

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Mr. Flohr: I don't think so.

The Court: Oh, no question about it.

Mr. Marx: Your Honor overlooks that the Realty Company would be subrogated to the lien of the certificate holders. If it met its guaranty it would be *pari passu* with them in sharing it.

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The Court: That may very well be, but the point is that if that had been known six months ago, why the creditors might have sought a reorganization under Chapter X.

Mr. Rickaby: Of course, if your Honor should dismiss this proceeding now the thing that Mr. Marx is naturally worried about and wants to keep the present proceeding alive because concededly a proceeding could be instituted under Chapter X whether the present debtor likes it or not.

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Mr. Marx: There was no default at the time in December, which seems to disturb everybody.

The Court: But the interest had not been earned. That is the point.

Mr. Flohr: It was not earned for a year and a half before or two years before that and we paid it.

The Court: Well, how did you pay it?

Mr. Flohr: We paid it by advancing money.

The Court: The company did.

Mr. Flohr: The company did, yes, sir.

The Court: But this time you had the Trinity Buildings Corporation go to the bank and borrow it.

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Mr. Flohr: I don't know that there is anything very unusual about that.

The Court: Tell me, was the money thus advanced paid back later on?

Mr. Flohr: Yes, sir, it was, to the bank—no, not the money that we advanced.

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The Court: That is the point. For a year before that you had advanced money to take care of your guaranty, is that right?

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Mr. Flohr: Yes, sir.

The Court: And for that you have not been reimbursed?

Mr. Flohr: That is right.

The Court: So that this is the only six months period during which this procedure that you have outlined was followed.

Mr. Flohr: Well, I wouldn't be so sure about that either. We may have done it to pay taxes where taxes had to be paid in advance of the time the money was earned.

The Court: I am not talking about that. I am talking about interest, not about taxes.

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Mr. Flohr: I couldn't answer that without consulting. It would not stick with me. It was not with me an unusual procedure.

The Court: Wouldn't you remember whether or not the net income of a certain six months' period was used to supplement the net income of the prior six months' period in order to pay the interest on these Trinity Buildings Corporation certificates.

Mr. Flohr: No, sir, I would not. I would think that would be all right.

Mr. Marx: Your Honor, in addition to that, for several years when there was no need to pay the sinking fund by reason of the mortgage moratorium I believe the United States Realty Company paid the sinking fund payments.

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Mr. Arkush: May I make a suggestion?

The Court: Yes.

Mr. Flohr: There is a point here, your Honor, that is brought up, that I think is important. We borrowed this

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money on the 1st of December. Now the taxes in effect had been prepaid for an amount approximating \$27,000 and the amount of this loan that was made to pay interest was really to get back part of the money that we paid for taxes in advance. So that actually we didn't use the earnings of the subsequent period to pay interest but rather used them to pay taxes.

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The Court: Well, in this case, however, so far as June 1st was concerned, you had paid a half year's taxes, so that you were a month ahead, weren't you, in figuring out the rental? I mean if you are going to apply that principal at one end, you can apply it at the other.

Mr. Flohr: Yes, sir, that is true. At June 1st there was a month's taxes paid in advance.

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The Court: So that what happened was this: this six months' net income from the building has been charged with taxes for December of the prior year—has been charged with seven months' taxes.

Mr. Flohr: No, sir, it has not; six months.

The Court: Of course. Why not?

Mr. Flohr: Because at December 1st we had a month's taxes paid in advance and on June 1st we had a month's paid in advance.

The Court: I know, but you paid the June 1st taxes and you say you were really borrowing money from the bank to pay the month of December taxes. You consider the year as having twelve months and divide the taxes accordingly. If you were borrowing for that—

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Mr. Flohr: I didn't really say that we were borrowing for it. I say that the taxes had been paid in advance, so that in effect we were just replacing money—

The Court: Here you have a situation where there is a

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month's taxes paid in advance when you figure June 1st. I don't see that the argument cures the situation any.

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Mr. Marx: We were trying to figure out what, if any, interest could be paid to these certificate holders and I believe in the event the proceeding is not dismissed—

The Court: That is what led up to this discussion, how much money there should be available now, and I was surprised it was only \$37,000 out of a gross income of \$439,000. Of course I haven't any way of deciding it. You would need an accountant to determine it.

Mr. Marx: We would be glad to have any accountant in.

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The Court: It goes back to the point we were discussing, whether or not this interest should be paid, the interest that has been earned, should be paid to these debenture holders.

Mr. Arkush: May I address you a moment?

The Court: Yes.

Mr. Arkush: As I understand it, there are two questions before your Honor. First, shall you dismiss—

The Court: Under Section 376, subdivision 2.

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Mr. Arkush: So as in effect to force the U. S. Realty Company into Chapter X, or shall you hold the proceeding to see whether the parties or as many as possible of the parties, can agree on an alteration or modification which can be submitted to the certificate holders. The other question before your Honor is, if you do hold the proceeding, how much, if any, shall now be paid to the certificate holders?

On the first question, I feel very strongly that it is very much against the interest of these certificate holders to have a Chapter X proceeding at this time, particularly for this reason: that the debenture holders whose obligations would otherwise not become due till January 1st, 1944, would immediately be in a position to exact their full claim against

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this estate and they will make the argument that the Trinity certificate holders having security presumably of the value of their principal, should have no share in any reorganization of the guarantor's estate. And it is very likely that that position will be sustained by the court because it is very evident that the value of the security is uncertain and the amount of any deficiency, if any, which might be established against this estate of the Trinity certificate holders, can be discounted at the present time, and that the Trinity certificate holders would be under a very precarious position under Chapter X proceedings. That is the principal argument.

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The second one is one of splitting the certificate holders. The principal certificate holders are represented by Mr. McLanahan and the small certificate holders by various committees. If you exclude those certificates you have got an average holding of \$2100 and these certificate holders want their security in good standing. Certainly the institutions want their security in good standing.

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Finally, a Chapter X proceeding with as complicated a situation as this is going to take years.

The Court: Oh, no.

Mr. Arkush: That is my opinion. We have a very simple proceeding over in Jersey where there is a similar procedure. That has been over there for a year and a half. There are going to be long fights and there are going to be appeals and the S. E. C. is going to have a lot to say and it is going to be a matter of years.

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Now on the question of the amount of interest that ought to be paid, I think that the debtor would be well advised to make a contribution right now to the amount of interest to

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1060 be paid entirely aside from any question of accounting as to what the property has earned. And I think if you take the \$37,000 and increase that as much as the debtor is willing to make a round payment of say two per cent or $1\frac{3}{4}$ per cent for six months, it would better the position of the debtor and they would get credit for it in the plan. The only legal weakness, the one technical weakness of this present plan, and I think the one reason why Mr. Rickaby has been in such a strong position in attacking the plan is that the certificate holders have been asked to give up something that has accrued to date. I think the debtor would be well advised to make up as much of that as possible even before an amended plan is negotiated and then in the amended plan I think they would be well advised to agree to pay the rest of it, not necessarily now, it may be paid over a course of years. That is a matter of negotiation. But at least they ought to close up that hole in the plan and take that argument away from Mr. Rickaby.

1061 The Court: I don't think he would object to that.

1062 Mr. Arkush: Now, on the procedure, now that the institutions are represented, and I am glad that they are represented, I do think that in a couple of days we may get together and that even Mr. Rickaby would be won over. We could get together in your Honor's absence. There would not need to be an adjournment. Your Honor could have the altered plan sent to you. You could sign a short order permitting it to be filed. That would not be an approval, it would simply be an order permitting it to be signed and permitting the debtor to send copies of it for acceptance.

The Court: Is it your idea that a Burchill Act proceeding would be instituted at the same time?

Mr. Arkush: A Burchill Act proceeding to be instituted at the same time.

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The Court: Offering the same plan?

Mr. Arkush: Offering the same plan.

The Court: With modifications that would meet the obligation of the principal mortgagor?

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Mr. Arkush: That is right.

The Court: That would mean the same in respect of the length of time—

Mr. Arkush: Yes.

The Court: The amount of interest?

Mr. Arkush: Precisely the same.

The Court: The sinking fund and things like that?

Mr. Arkush: Precisely the same plan. A point which I have not investigated about which perhaps Mr. Marx can advise, is that the certificate holders or the trustee in their behalf can't safely institute a Burchill Act proceeding without endangering the guarantee in case the Chapter XI proceeding did not go through. That was the reason for postponing the Burchill Act proceeding for this proceeding because you might lose your guarantee.

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Mr. McLanahan: On behalf of these institutions I strongly support that position. I think it would be unfortunate to delay these proceedings and drag them out into a Chapter X proceeding. I myself have great misgivings as to time and expense and complications involved in a Chapter X proceeding, and I know it is the desire of these institutions to save all expense possible and to proceed with this proceeding, if it can be done, by such an amendment as has been suggested, so that the Burchill Act proceeding can go along simultaneously, and I was to urge your Honor to consider that procedure rather than a dismissal of these proceedings at this time and the necessity of instituting new proceedings under Chapter X.

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Mr. Rickaby: I make this suggestion:—

1066 The Court: Meet the point which has just been raised. What do you say now? Do you think these proceedings should be dismissed or do you think there should be an amended plan that would be consistent in its provisions with a proceeding under the Burchill Act in respect to the reorganization of the principal obligation, or should this proceeding be dismissed?

Mr. Rickaby: I say this, your Honor, I have very little hope of getting together on an amended plan unless a substantial part of this equity is turned over to the certificate holders.

The Court: What equity?

1067 Mr. Rickaby: I mean of the stock of the Trinity Buildings. For instance, this Trinity Building, as I pointed out before, it is not impossible that that may not be worth—

The Court: They will give you the property.

Mr. Rickaby: The other people are not willing to take it back. There may be something worked out in the way of an intervening preferred stock or something like that.

The Court: Now, would you mind answering a few questions?

Mr. Rickaby: No, sir.

The Court: Do you favor an amendment of this plan under Chapter XI instead of a dismissal of this arrangement?

1068 Mr. Rickaby: A possible amendment might be satisfactory. I am inclined to think that there should be a dismissal.

The Court: Which do you think is a better course? I want to know.

Mr. Rickaby: I think a dismissal is better.

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The Court: Is better than an amendment?

Mr. Rickaby: I think a dismissal is better. I think we can come in under Chapter X and do better. I would not insist on that, your Honor, to this extent, and I was going to make this suggestion: that if Mr. Arkush's suggestion was followed—for instance, if immediately half of the interest that is now due was paid and if the guarantor contributed whatever amount was necessary over and above the funds available to the Buildings Corporation to make that payment, I should be perfectly content to sit down and try to work something out. But bear in mind that if nothing like that is done and you just adjourn this proceeding, you are precluding the trustee for these certificate holders by virtue of the existing injunction from bringing a suit against the debtor in this proceeding for the installment of interest which is now due. And that suit would be prosecuted and there would be no defense to it. So that from the standpoint of self-preservation it would seem sensible for the debtor to be willing to do something as I have suggested.

The Court: When you say half of the interest, what do you mean? One-half of three per cent? What do these certificates carry?

Mr. Arkush: Five and a half per cent.

Mr. Rickaby: There is a coupon for six months' interest now due. That would be $2\frac{1}{2}\%$. I should say that they ought to pay half of that. Whatever that figures out. I am not so quick on my mathematics as I used to be.

Mr. Marx: One and three-eighths.

The Court: Well, make it one and a half and call it a day.

Mr. McLanahan: I feel very strongly, if your Honor please, that we would go a great way to prevent the dis-

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missal of all these proceedings and the institution all over again of Chapter X proceedings. I think it would be very unfortunate. I think the certificate holders would lose a great deal more in the added expense than they would lose by the delay or by their not receiving a portion of the interest now due. I agree with Mr. Rickaby that there should be every possible effort made by the debtor and the debtor should be compelled to make such an effort to meet as large a portion of this interest as possible. And I say that if the debtor would meet one-half of the $2\frac{3}{4}$ per cent or whatever it is, that the certificate holders would—

The Court: I think Mr. Rickaby is right. If you are going to make any payment it ought to be $1\frac{1}{2}$ per cent.

Mr. Marx: We are perfectly willing to accede to Mr. Rickaby's request of $1\frac{1}{2}$.

The Court: What about the other committees?

Mr. Scheminger: My position is this. I represent the Earl Committee. Assuming that this $1\frac{1}{2}$ per cent were paid, I would be agreeable to an adjournment, but I would like some indication that there will be some modification of this plan on the part of the debtor. We have all talked about improving it and modifying it, but there has not been anything said to my knowledge of any substantial giving away on the part of the debtor.

Mr. Arkush: That is not so. There was a meeting with Col. Hartfield.

Mr. Rickaby: Let us not go into that.

Mr. Arkush: No. I think it would be prejudicial to discuss it before your Honor.

The Court: Yesterday there were two motions on in the bankruptcy part of the court in relation to applications by the debtor for leave to enter into a contract to sell two

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parcels of real estate, and those motions were referred to me by Judge Hulbert who was in the motion part. The attorneys came up to chambers and while we were talking about those two motions we got to discussing some of the other problems in this case and I indicated to them how I felt about some of the issues that had been raised, the legal points as well as involving the practical operation of the whole arrangement. I suggested that they get together, hold a meeting in advance of the session today, so that they could see what might be done to meet those objections. I told them that I felt it was not a feasible plan for the reasons that I have stated here on the record today, which was practically a repetition of what I told them yesterday. And I told them that I thought they might here today be prepared for the hearing in court here today if they immediately got the various committees together and the other attorneys who have appeared in the proceeding and start discussing the situation that is presented.

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Mr. Marx: We did, your Honor, but unfortunately counsel for the various committees could not reach their committees. Of course that is natural on such short notice.

The Court: Would there be any objection then to this procedure: in view of the statement of the Court it is considered that such plan is not feasible for the reasons that have been stated, that an opportunity is to be afforded to the debtor to amend that plan so as to meet not merely the various objections of the special provisions of the plan but the main objection that there is no companion proceeding in the State court yet instituted which should be instituted, and also that this be on condition that 1½ per cent be paid to the certificate holders on the interest that was due on June 1st, and then of course, so that there will be no delay in the mat-

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ter, so that you can work along during the summer time, I intend to refer the whole matter, if I don't dismiss the proceeding, to one of the referees in bankruptcy, and let him handle all of the details from now on. In the meantime, the Securities and Exchange Commission if it desires to appeal from my denial of that part of its motion to dismiss on the ground that this court has no jurisdiction, as I held the court has jurisdiction under Chapter XI, it may take the necessary steps to get an appeal on the way if it desires a review of that issue by the Circuit Court of Appeals of this Circuit.

Let me say this: I don't believe there is a judge or referee in this building who would not in a Chapter XI proceeding permit the Securities and Exchange Commission to be heard as a friend of the court, and who would not welcome their assistance. So that from a practical viewpoint you have gained your point as soon as you are permitted to be heard as a friend of the court. You haven't any right of appeal under Chapter X, as I understand it. That is correct, isn't it?

Mr. Arkush: There is no right of appeal by the S. E. C.

The Court: Of course you are given such rights in connection with the presentation, consummation, and formulation of a plan, all of which I am sure the referee to whom I will send this matter would afford you in this Chapter XI proceeding without any specific provision of the Act itself, just the same as I would. The Court would want to lean on the investigations of the S. E. C. naturally because after all, what are we here for? To do justice. The longer you are here the more you will realize that the principal burden on the part of the judge or referee is to get all the facts. What are all the facts? You can't reach a decision until

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you know all the facts. So that the trial of a lawsuit or a proceeding is a search for the truth all the time.

Mr. Zolotar: Well, as your Honor understands, we are very grateful for the opportunity of being heard on this question that we have raised and we are also very glad that you have granted our motion for intervention. But our point goes a little further. We feel that although we have been permitted to participate to a limited extent in this proceeding that actually the provisions of Chapter XI do not permit us to do a good job. The provisions that do help us are in Chapter X.

The Court: I will say this: I won't retain jurisdiction of this matter. If I did, I would afford you an opportunity to do all that you could possibly do under Chapter X. And I state now on the record that I hope that the referee to whom the matter is referred will follow that very course, and I am sure that the debtor won't have any objection to it, either.

Mr. Arkush: I hope your Honor doesn't mean that you are going to force them to the rigmarole of waiting for a report and inserting a report to the certificate holders?

The Court: No. Of course, you would have to send out to the certificate holders anyway a proposed amended plan under Section 364. Is that the section?

Mr. Arkush: Yes, Section 364. The alteration has to be sent out.

The Court: And with that I assume the committees will send out letters if the Securities and Exchange Commission approves. Leaving out the question of jurisdiction and just considering it on its merits, I don't know that you need anything further.

Now, we have had a very complete discussion of this

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matter, but we have got to get down and enter some orders and do something in a very definite, practical, legal way, so that I can leave it in shape tomorrow.

There isn't any objection from anyone in the courtroom to a further amendment of this plan if concurrently there is a proceeding under the Burchill Act in the State court? Is that correct?

Mr. Zolotar: Well, our formal objection to the whole proceeding.

The Court: I know, that the court has no jurisdiction under Chapter XI and that you think it should be done under Chapter X.

Mr. Rickaby: I don't want to say there is no objection to an amendment, but I have no objection to an adjournment to see whether it may be satisfactorily amended.

The Court: How can it be—

Mr. Arkush: Technically it is not an adjournment. We have to reopen the hearing under Section 364.

The Court: I will reopen it and refer it to one of the referees. There is no objection to that course?

And one of the conditions would be that the certificate holders be paid $1\frac{1}{2}$ per cent interest.

The coupon called for what?

Mr. Marx: $2\frac{3}{4}$ %.

The Court: They will get $1\frac{1}{2}$.

Mr. Marx: Mechanically, I think we should present an order to your Honor before you go away.

Mr. Arkush: Yes. Mr. Marx, see that that order contains the proper provisions protecting the certificate holders so that the acceptance of the $1\frac{1}{2}$ per cent is without prejudice.

Mr. Marx: Certainly.

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The Court: Gentlemen, you will all have to get to work on this order this afternoon. I will adjourn this session we have had today until tomorrow, and I will give you until tomorrow at noon time to get your orders in shape and we will reconvene tomorrow at noon time. Meanwhile these various committees can agree on a form of order and I will enter a proper order on these various matters.

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Mr. Rickaby: I think there is one condition that should be imposed. The question of law has been raised that with the injunction pending here in this court, in this proceeding, that a Burchill Act proceeding which involves a foreclosure, that if the foreclosure were brought on without this debtor being a party, it might have some effect of releasing the debtor. I think this debtor should be required to deliver to the Guaranty Trust Company, the trustee of the Trinity Buildings Corporation, an agreement that such an institution of foreclosure should not operate—

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The Court: No, but that should be set forth in the arrangement and in your plan of reorganization under the Burchill Act.

Mr. Arkush: No, Mr. Rickaby is right, because if the plan would not go through we would lose our—

Mr. Rickaby: There should be a separate agreement filed with the trustee or else the injunction in this proceeding should be lifted to such an extent as to permit the debtor to be joined in the Burchill Act proceeding.

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Mr. Marx: That is mechanical.

The Court: Yes, that will be done. I suggest that you men confer this afternoon and that we just adjourn this hearing until tomorrow at twelve o'clock in this courtroom. Now, work out all the details, get all your papers in shape and then I will sign them before I leave tomorrow afternoon.

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Mr. Arkush: Does your Honor want an order of reference prepared?

090 The Court: Yes. The matter will be sent to a referee in bankruptcy. Not a special master. A referee in bankruptcy.

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(Adjourned until July 28, 1939, 12:00 noon.)

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Hearing before Judge Leibell—July 28, 1939.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Bankruptcy, No. 74,023.**

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[SAME TITLE]

Before :

HON. VINCENT L. LEIBELL,

District Judge.

New York, July 28, 1939, 12.00 noon.

A P P E A R A N C E S :

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WHITE & CASE, Esqrs.,

Attorneys for Debtor;

Henry M. Marx, Esq., of Counsel.

HAROLD A. SCHEMINGER, Esq.,

Attorney for Ralph W. Earl and

Donald M. Halsted, as members of

Bondholders Protective Committee.

SIMPSON, THACHER & BARTLETT, Esqrs.,

**Attorneys for Bondholders Committee of
which James A. Beha is chairman;**

1095

H. McAfee, Esq., of Counsel.

I. NEWTON BROZAN, Esq.,

Attorney for Grace Kreusser, a creditor;

Aaron Holman, Esq., of Counsel.

Hearing before Judge Leibell—July 28, 1939.

J. A. PANUCH, Esq.,

Attorney for Securities and Exchange
Commission, Amicus Curiae.

George Zolotar, Esq., and

Marland Gale, Esq., of Counsel.

RALPH M. ARKUSH, Esq.,

Attorney for Mortgage Certificate
Holders.

The Court: The Securities and Exchange Commission, have you got your order for intervention?

Mr. Zolotar: Yes. I gave a copy to Mr. Marx, but I don't believe I have given a copy yet to any of the other parties.

The Court: Do any of the other attorneys wish to look at it?

Well, your sole purpose is to contest the jurisdiction of the court, isn't that it?

Mr. Zolotar: In this order, yes, your Honor.

The Court: It strikes me that you could have gone a little beyond that.

Mr. Zolotar: This order conforms with the motion that we have made.

The Court: It does? Does it?

Mr. Zolotar: Yes, I think it was limited for those purposes.

The Court: Let me see where your motion papers are. Did you have two motions before me?

Mr. Zolotar: Yes. We have an order with respect to the other motion also.

The Court: What was that motion?

Mr. Zolotar: That was the motion to dismiss on jurisdictional grounds.

Hearing before Judge Leibell—July 28, 1939.

The Court: Now, I have made an endorsement on the back of your motion papers. There is the order on that one and here is the order on this. Now you can just take them up and my secretary will see that they are filed.

* * * * *

Now what other orders have you, Mr. Marx?

Mr. Marx: I have here two orders which all the parties have seen, one referring the proceeding to a referee in accordance with your Honor's statement yesterday and the other order providing for the payment of interest.

The Court: Any objection to the orders?

Mr. Zolotar: With respect to the order referring the proceeding to a referee, for the record we would like to note our objection, on the ground that we contend that this court has no jurisdiction over this proceeding.

The Court: Yes, that is already on the record.

Mr. Zolotar: Thank you.

The Court: Referee Joyce will be here in August, won't he, Mr. Lewis?

Mr. Lewis: I am so informed.

The Court: He has had a lot of experience in these real estate reorganizations. I think I will send this matter to Mr. Joyce.

Now on the order of reference I have stated, "Upon all the proceedings heretofore had herein, and pursuant to the direction stated on the record of the hearing on July 27, 1939, it is ordered"—I have stated that so that the referee will have before him my directions in the matter. It is just not a general reference. I want him to know what my position has been on a number of these issues that we had before us and on which we took testimony and received briefs and heard argu-

Hearing before Judge Leibell—July 28, 1939.

ment. All right, I have signed that. Is there anything further?

1102 Mr. McAfee: Your Honor, I hesitate to raise this because it is rather technical.

The Court: Whom do you represent?

Mr. McAfee: The Beha Committee. The motion of the Securities and Exchange Commission to dismiss the proceeding is on two grounds—one, on the jurisdictional ground; and secondly on the ground of fairness and feasibility.

The Court: Yes.

1103 Mr. McAfee: I have no doubt as to your Honor's intention, but I should like it to be plain on the record because the order submitted says simply "Denied." If that objection is too technical I think the mere statement on the record will be sufficient—for my purposes certainly.

1104 The Court: I think I already have made a statement under date of July 27th, that is, yesterday, in which I stated that the motion was denied insofar as it related to the jurisdiction of the court. I held that the court had jurisdiction under Chapter XI but I stated not merely on their motion but on other points, too, that were argued by other counsel in the case that in my opinion the proposed arrangement could not be confirmed, should not be confirmed by the court, because I did not deem it feasible, and further, that there were certain specific provisions in it that I thought were objectionable and I thought would have to be eliminated. It was then a question of a choice between two courses, one under Section 376, subdivision 2, to dismiss the proceeding and let the parties start all over again, or else under Section 364, I think, as pointed out by Mr. Arkush, to consider some amendment to the plan. Now, if the amendment would be just a patchwork, it would not serve at all. It would have to be

Hearing before Judge Leibell—July 28, 1939.

a recast arrangement or plan which would bear the title of an amended plan and on which the certificate holders would have to receive notice as required under Section 364, and which also would be the basis for the form of a consistent plan for the reorganization of the mortgage under the Burchill Act.

Now that is as clear as can be.

Mr. McAfee: Well, your Honor's statement serves my purpose.

The Court: Now that is on the record twice.

Mr. Arkush: I want to raise a technical question.

The Court: What is your point? Just a minute. I hear that Referee Joyce will not be here during August.

Mr. Arkush: I doubt whether we will get to a plan until the end of August, your Honor.

The Court: Referee Joyce is here now, isn't he?

Mr. Lewis: Yes.

The Court: He will be back at the end of August?

Mr. Lewis: I believe so.

The Court: The parties can go down and ask him to set a date for a hearing or for certain informal conferences before the hearing and at all these conferences you will want all the attorneys who have been receiving notice in this proceeding and also the committees to receive proper notice. Referee Joyce will be back the end of August?

Mr. Lewis: Yes.

The Court: Now, what were you about to say, Mr. Arkush?

Mr. Arkush: This is another technical question addressed to the order permitting the S. E. C. to intervene for the purpose of moving this court to dismiss the debtor's petition to deny confirmation of the debtor's proposed arrangement. Now suppose the S. E. C. appeals?

Hearing before Judge Leibell—July 28, 1939.

The Court: Read on. All on the basis of the court's acts.

1108

Mr. Arkush: What I have in mind is, suppose they lose their appeal? Are they still here for the purpose of attacking the arrangement?

The Court: They are here as a friend of the court anyway.

Mr. Arkush: They should not be here as an intervenor to attack the arrangement.

Mr. Zolotar: As I said before, this conforms very closely to the language we used in our original motion. I don't think there can be any question about it.

Mr. Arkush: Why not take out the words "to deny confirmation of the debtor's proposed arrangement"?

1109

Mr. Zolotar: That is one of the bases on which we urged the motion.

Mr. Arkush: Well, to deny confirmation of the debtor's proposed arrangement on jurisdictional grounds.

Mr. Zolotar: The grounds are stated in our motion and I believe it is covered fully here. All we urge is that the court ought to deny the confirmation of the debtor's proposed arrangement because the court lacked jurisdiction.

Mr. Marx: I believe that your Honor's statement on the record that it is solely on the jurisdictional ground should suffice.

1110

The Court: I think that is what you wanted and that is what you have. I suppose it could be made a little clearer but let it stand.

• • • • •

*Exhibits Received into Evidence.***Debtor's Exhibit 1.**

	Total Gross Income (Rentals and Electric Cur- rent Sold &c.)	Real Estate Taxes	Interest on the First Mortgage Loan.	Other Operating and Maintenance Expenses	Income or Loss* Before Provision for Depreciation	1111
1934 ..	1,260,778.84	337,280.00	221,446.93	380,121.55	321,930.36	
1935 ..	1,079,495.08	338,400.00	212,464.45	427,819.58	100,811.05	
1936 ..	1,009,896.98	324,000.00	207,220.00	533,434.05	54,757.07*	
1937 ..	1,049,027.74	328,440.00	204,077.50	537,293.17	20,782.93*	
1938 ..	915,029.49	328,892.50	204,077.50	433,606.37	51,546.88*	

Debtor's Exhibit 2.

The operations for the six months ended May 31, 1939, show earnings towards the payment of interest in the amount of \$37,914.83 as follows:

Gross Income	\$439,877.45
Real Estate Taxes	163,043.06
Other Operating and Maintenance Ex- penses	238,919.56
Balance available for interest	37,914.83

1112

1113

Exhibits Received into Evidence.

1114

Debtor's Exhibit 3.

1115

(See Opposite)

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*Exhibits Received into Evidence.***Debtor's Exhibit 3.**

STATEMENT SHOWING THE ESTIMATED NET INCOME OF TRINITY BUILDINGS CORPORATION OF NEW YORK FOR THE THREE YEARS AND ONE MONTH ENDING DECEMBER 31, 1941 AVAILABLE FOR PAYMENT OF INTEREST.

	6 Mos. Ended May 31, 1939 (Actual)	7 Mos. Ending Dec. 31, 1939 (Estimated)	13 Mos. Ending Dec. 31, 1939 (Estimated)	Year Ending Dec. 31, 1940 (Estimated)	Year Ending Dec. 31, 1941 (Estimated)
Gross Income:					
Rents	412,456.89	445,057.43	857,500.00	758,000.00	758,000.00
Electric Current Sold	26,916.35	30,725.72	57,600.00	53,100.00	53,100.00
Misc. Income	504.21	420.08	900.00	800.00	800.00
	<u>439,877.45</u>	<u>476,203.23</u>	<u>916,000.00</u>	<u>811,900.00</u>	<u>811,900.00</u>
Less:					
Real Estate Taxes	163,043.06	182,002.07	345,000.00	310,000.00	310,000.00
Other Operating and Maintenance Expenses					
Operating Expenses	174,364.93	197,515.54	372,000.00	337,800.00	337,800.00
Repairs & Tenant Changes	37,591.71	24,369.17	61,900.00	54,300.00	54,300.00
Insurance	8,362.69	9,660.68	18,000.00	16,200.00	16,200.00
General & Corporate Expenses & other Taxes	18,600.23	15,525.50	34,100.00	31,700.00	31,700.00
	<u>238,919.56</u>	<u>247,070.89</u>	<u>486,000.00</u>	<u>440,000.00</u>	<u>440,000.00</u>
Total Other Operating and Maintenance Expenses	238,919.56	247,070.89	486,000.00	440,000.00	440,000.00
Total Taxes and Other Operating and Maintenance Expenses	401,962.62	429,072.96	831,000.00	750,000.00	750,000.00
Net Income available for Interest	37,914.83	47,130.27	85,000.00	61,900.00	61,900.00
	<u><u>37,914.83</u></u>	<u><u>47,130.27</u></u>	<u><u>85,000.00</u></u>	<u><u>61,900.00</u></u>	<u><u>61,900.00</u></u>
Fixed Interest Requirements under Amended Plan			<u><u>120,591.25</u></u>	<u><u>111,315.00</u></u>	<u><u>111,315.00</u></u>

Exhibits Received into Evidence.

Debtor's Exhibit 4.

UNITED STATES REALTY AND IMPROVEMENT COMPANY.

PRO FORMA ESTIMATED BALANCE SHEET AS AT JUNE 1, 1939.

Giving effect to adjustment of the assets in accordance with Note 1,
the elimination of reserves and the resulting adjustment of the Deficit
Account.

ASSETS	LIABILITIES
Current Assets:	Current Liabilities:
Cash	Accounts payable
Accounts and accrued interest receivable	Accrued taxes and interest
\$ 335 095.32	\$ 1 143.30
58 984.80	73 773.29
Total Current Assets	Total Current Liabilities (Exclusive of Notes Payable and sinking fund payments due within one year)
394 080.12	74 916.59
Sinking Fund Deposit	Debentures and notes payable (for sinking fund payments due within one year, See Note 2)
60.14	Fifteen Year Sinking Fund, 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—
Investments in and Advances to Subsidiaries:	(See Note 4) \$2 162 500.00
Trinity Buildings Corporation of New York (Including Capital Stock—\$1,000,000)	Less—Held in treasury
\$ —	(See Note 4) 959 000.00 \$1 203 500.00
Lawyers Building Corporation	6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$22,000.00 principal amount retired)
G. A. F. Realty Corporation	(See Note 4) 1 187 000.00
375.00	Less—Held in
Whitchell Improvement Corporation (Including mortgage receivable of \$1,000,000.00 pledged to secure Note Payable of \$3,000,000.00)	1 135 500.00
5 200 000.00	Note Payable, 4%, due August 12, 1939 (Secured by pledge of inter-company mortgage of \$1,000,000.00 on Whitchell Building)
Blaza Operating Company—Non-interest bearing demand note in principal amount of \$3,930,000.00; 25,000 shares of Preferred Stock, par value \$100.00 each and 34,483 shares of Common Stock, par value \$1.00 each	3 000 000.00
—	Note Payable, 4%, due \$37,500.00 on
Note receivable, 4%, due August 30, 1940 (Deposited as collateral to Note Payable of \$137,500.00)	
137 500.00	
5 337 875.00	
Investment in George A. Fuller Company, 7,786 shares of 4% Cumulative, Convertible Preferred Stock, par value \$100.00 each, and 7,893 shares of Common Stock, par value \$1.00 each—(of which	

Investments in and Advances to Subsidiaries:

Trinity Buildings Corporation
of New York (Including Capital
Stock - \$1,000,000)

\$ —

Lawyers Building Corporation

—

G. A. F. Realty Corporation

375.00

Whitehall Improvement Corpora-
tion (Including mortgage receiv-
able of \$1,000,000.00 pledged to
secure Note Payable of \$3,000,-
000.00)

5 200 000.00

Plaza Operating Company—Non-
interest bearing demand note in
principal amount of \$3,930,000.-
00, 25,000 shares of Preferred
Stock, par value \$100.00 each
and 34,483 shares of Common
Stock, par value \$1.00 each

—

Note receivable, 4%, due August
20, 1910 (Deposited as collateral
to Note Payable of \$137,500.00)

137 500.00

5 337 875.00

Investment in George A. Fuller Com-
pany, 7,786 shares of 4% Cumu-
lative Convertible Preferred
Stock, par value \$100.00 each, and
7,893 shares of Common Stock,
par value \$1.00 each—(of which
7,331 shares of 4% Cumulative
Convertible Preferred Stock and
2,007 shares of Common Stock
having a quoted market value of
\$366 700.00 are deposited as col-
lateral to Note Payable of \$137,-
500.00)

477 300.00

Notes receivable, investments in
and advances to other real estate
companies, and investments in
other stocks and bonds

(See Note 2)

555 654.95

Unimproved real estate

290 000.00

Office furniture and fixtures

1 458.18

Prepaid expenses, etc.

20 087.53

\$ 7 076 515.92

See attached sheet for notes 1, 2, 3, 4 and 5 which form an integral

payments due within one year,
 Debentures and notes payable (for sinking fund payments due within one year, See Note 3):

Fifteen Year Sinking Fund 6% Gold Debentures of G. A. F. Realty Corporation, dated January 1, 1929 and due January 1, 1944 (Guaranteed by United States Realty and Improvement Company as to principal, interest and sinking fund payments—

(See Note 4) \$2 162 500.00

Less—Held in treasury

(See Note 4) 959 000.00 \$1 203 500.00

6% Sinking Fund Debentures due January 1, 1944, of United States Realty and Improvement Company (less \$222,000.00 principal amount retired)

(See Note 4) 1 187 000.00

Less—Held in

treasury 57 500.00 1 135 500.00

Note Payable, 4%, due August 12, 1939 (Secured by pledge of inter-company mortgage of \$1,000,000.00 on Whitehall Building)

3 000 000.00

Note Payable, 4%, due \$37,500.00 on November 30, 1939 and \$37,500.00 quarterly thereafter until August 30, 1940 when balance becomes due (Secured by pledge of 7,334 shares of 4% Cumulative Convertible Preferred Stock and 3,667 shares of Common Stock of George A. Fuller Company and \$137,500.00 Note of Plaza Operating Company)

137 500.00 5 476 500.00

Capital Stock:

Authorized and issued—900,000 shares without par value—stated value

18 000 000.00
 (16 474 900.67)

Deficit

Contingent liabilities (see Note 5)

\$ 7 076 515.92

part of this Pro Forma Estimated Balance Sheet.

*Exhibits Received into Evidence.**Debtor's Exhibit 4.***UNITED STATES REALTY AND IMPROVEMENT
COMPANY****NOTES TO THE PRO FORMA ESTIMATED BALANCE SHEET
As at June 1, 1939.**

- 1126
- (1) The amounts shown on this Balance Sheet with respect to assets are quoted market values as at June 1, 1939, or values estimated by Arthur J. Flohr, Vice President and Treasurer of the United States Realty and Improvement Company, in his testimony as to such assets on July 7th, 1939. Some of these assets are included at no value or at nominal values and, undoubtedly, some have potential values in excess of the amounts at which they are included.
- 1127
- (2) Voting trust certificates representing 8,576 shares of Class "B" Common Stock of Fuller Building Corporation carried on the books of United States Realty and Improvement Company at the nominal value of \$1.00 are pledged as security for its guarantees of interest, sinking fund and principal at maturity of G. A. F. Realty Corporation Fifteen-Year Sinking Fund 6% Gold Debentures and as security for the 6% Sinking Fund Debentures, due January 1, 1944, of United States Realty and Improvement Company, subject to an agreement to surrender such stock to Fuller Building Corporation in the eventuality of a lack of certain earnings by that corporation.
- 1128
- (3) Sinking fund payments due within one year—
G. A. F. Realty Corporation, Fifteen-Year Sinking Fund 6% Gold Debentures—\$153,000. (which may be paid in cash or in debentures at the redemption price of 102).

*Exhibits Received into Evidence.**Debtor's Exhibit 4.*

United States Realty and Improvement Company holds \$959,000. principal amount of these debentures which may be used for sinking fund purposes.

1129

United States Realty and Improvement Company, 6% Sinking Fund Debentures due January 1, 1944—\$14.37 on November 15, 1939 and on May 15, 1940 for each \$500. principal amount of Debentures theretofore issued (which may be paid in cash or in debentures at the redemption price of 102). The Company holds \$51,500. principal amount of these debentures which may be used for sinking fund purposes. (see Note 3)

1130

- (4) The 6% Sinking Fund Debentures of United States Realty and Improvement Company were and are being issued pursuant to a Trust Agreement and the Reorganization Plan of G. A. F. Realty Corporation in exchange for 6% Debentures of the latter company on a par for par basis. G. A. F. Realty Corporation 6% Debentures so acquired, less amounts used for sinking fund purposes, are shown as held in treasury.

(5) Contingent Liabilities—

- (a) Guarantee of the principal, interest and sinking fund payments on the First Mortgage Twenty-Year Five and One-half Per Cent. Sinking Fund Gold Loan Certificates, dated June 1, 1919, of Trinity Buildings Corporation of New York. \$3,710,500.00 principal amount of these certificates and interest of \$102,038.75 were unpaid at June 1, 1939.

1131

- (b) Endorsement of the note payable for \$50,000, due \$25,000, July 30, 1939 and \$25,000 on August 30,

*Exhibits Received into Evidence.**Debtor's Exhibit 4.*

- 1132 • 1939 of Plaza Operating Company, which note has since been paid.
- (c) Proposed deficiency in Federal income taxes for 1933 which is being contested—approximately \$45,000.00. The company's Federal income tax returns for the years 1935 to 1938 inclusive, are subject to review by the United States Treasury Dept.
- 1133 (d) A proposed assessment of intangible personal property taxes by the City of Jersey City, N. J., for the years 1937 and 1938 in an indeterminate amount.
- (e) The Company reports no further contingent liabilities except in respect of pending routine litigation, claims for personal injuries, etc., which, in the opinion of the Company's counsel, will not result in losses of any consequence.
- 1134

*Exhibits Received into Evidence.***Debtor's Exhibit 6.**

WHAT IS THE CASH BALANCE OF THE DEBTOR AS AT MAY 31, 1939, AND YOUR ESTIMATE OF CASH RECEIPTS AND DISBURSEMENTS FOR THE PERIOD JUNE 1, 1939 TO DECEMBER 31, 1941? 1135

The Cash Balance of the debtor at May 31, 1939 was \$335,095.32
The estimated cash receipts and disbursements for the period from June 1, 1939 to December 31, 1939 are as follows:

RECEIPTS

Income from Investments	\$236,400.00	
Investments liquidated	20,600.00	
Receipt from sale of real estate	50,000.00	
	<hr/>	\$307,000.00

DISBURSEMENTS

Interest Payable	\$131,300.00	
General and Corporate Expenses	38,300.00	
Miscellaneous Taxes	13,000.00	
Provision for meeting the guarantee of Trinity Bldgs. Corp.		
1st Mortgage	35,000.00	217,600.00
	<hr/>	

Estimated Net Cash Receipts for the seven months ending Dec. 31, 1939	89,400.00
-----------------------------------------------------------------------	-----------

Estimated Cash Balance at Dec. 31, 1939	\$424,400.00	1137
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The estimated cash receipts and disbursements for the calendar year 1940, are as follows:

RECEIPTS

Income from Investments	\$333,300.00	
Investments liquidated	142,800.00	
	<hr/>	476,100.00

*Exhibits Received into Evidence.**Debtor's Exhibit 6.***DISBURSEMENTS**

1138	Interest Payable	260,000.00	
	General & Corporate Expenses	68,900.00	
	Miscellaneous Taxes	24,400.00	
	Purchase of Debentures for Sinking Fund	30,000.00	
	Provision for meeting the guarantee of Trinity Bldgs. Corp. 1st Mortgage	49,000.00	432,300.00

Estimated Net Cash Receipts for the year ending December 31, 1940

1139 Estimated Cash Balance at Dec. 31, 1940 \$46,000.00

The estimated cash receipts and disbursements for the calendar year 1941, are as follows:

Estimated Cash Balance at Dec. 31, 1940 \$46,000.00

RECEIPTS

Income from Investments	\$329,200.00	
Investments Liquidated	13,300.00	
		\$342,500.00

DISBURSEMENTS

1140	Interest Payable	254,600.00	
	General and Corporate Expenses	68,900.00	
	Miscellaneous Taxes	24,400.00	
	Purchase of Debentures for Sinking Fund	30,000.00	
	Provision for meeting the guarantee of Trinity Bldgs. Corp. 1st Mortgage	49,000.00	426,900.00
	Estimated Net Cash Disbursements for the year ending December 31, 1941		

Estimated Cash Balance at December 31, 1941 \$38,000.00

*Exhibits Received into Evidence.***Debtor's Exhibit 10.****ANNUAL STATEMENTS TO STOCKHOLDERS OF
DEBTOR FOR YEARS 1930 THROUGH 1938**

1141

[Pursuant to Stipulation dated September 13, 1939, the nine pamphlets comprising this exhibit have not been printed, but may be referred to by the parties, in which event copies will be furnished for use of the appellate court.]

[Debtor's Exhibits 5, 7, 8 and 9 have been omitted pursuant to stipulation].

1142

1143

00.00

00.00

*Exhibits Received into Evidence.***Earl Exhibit B.**

[as abridged by stipulation dated September 13, 1939].

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

and

**THE NATIONAL CITY BANK OF NEW YORK
AGREEMENT OF PLEDGE**

Dated: February 10, 1936.

AGREEMENT, dated February 10, 1936, between UNITED STATES REALTY AND IMPROVEMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as the "Company"), party of the first part, and THE NATIONAL CITY BANK OF NEW YORK (hereinafter referred to as the "Trustee"), a corporation organized and existing as a national banking association under the laws of the United States of America, as Trustee under a Trust Agreement dated as of January 1, 1929, executed by the G. A. F. Realty Corporation to provide for an issue of Fifteen-Year Sinking Fund 6% Gold Debentures due January 1, 1944 (hereinafter referred to as the "Old Debentures"), and as Trustee under a Trust Agreement dated as of July 1, 1935, executed by the Company to provide for an issue of Six Per Cent Sinking Fund Debentures (hereinafter referred to as the "New Debentures"), party of the second part;

WHEREAS, the Company on January 21, 1929 executed and delivered to the Trustee a separate instrument guaranteeing the due and punctual payment, in the manner provided in the Trust Agreement providing for the Old Debentures, of each and every Sinking Fund installment on the Old Debentures; and likewise endorsed on each Old

*Exhibits Received into Evidence.**Earl Exhibit B.*

Debenture a guarantee of the payment of principal thereof at maturity and of interest thereon; and

1147

WHEREAS, pursuant to the Plan of Reorganization for the G. A. F. Realty Corporation, confirmed by the United States District Court for the Southern District of New York in an order dated October 21, 1935 in proceedings under Section 77B of the Bankruptcy Act for the reorganization of a corporation, entitled "In the Matter of G. A. F. Realty Corporation, Debtor, No. 61331," the Company executed and delivered to the Trustee a Trust Agreement dated as of July 1, 1935, providing for the New Debentures which pursuant to the aforementioned Plan of Reorganization are to be exchangeable par for par for the Old Debentures; and

1148

WHEREAS, the aforementioned Plan of Reorganization and the aforementioned order of the United States District Court for the Southern District of New York approving the same provide that the Company pledge all of its right, title and interest in and to the Class B Common Stock, represented by Voting Trust Certificates, of Fuller Building Corporation received by it under said Plan of Reorganization as security for both Old and New Debentures;

NOW, THEREFORE, THIS AGREEMENT, WITNESSETH:

1149

That in consideration of the premises, the Company, for the purpose of securing the due and punctual payment of interest, sinking fund, and principal at maturity of the Old Debentures and for securing the performance of the Trust Agreement dated as of July 1, 1935, providing for

*Exhibits Received into Evidence.**Earl Exhibit B.*

150 the New Debentures, exchangeable par for par for the Old Debentures, hereby bargains, sells, conveys, transfers, assigns, pledges, sets over and delivers to the Trustee, its successor or successors in trust, all of its right, title and interest in 8,576 shares of Class B Common Stock of Fuller Building Corporation, represented by Class B Voting Trust Certificates issued under a Voting Trust Agreement dated as of January 31, 1936, executed between Fuller Building Corporation, stockholders thereof, and Richard Gordon Babbage, Samuel L. Fuller and Gerald Holsman, as Trustees, subject, however, to an Agreement, entitled the "Class B Common Stock Agreement," dated as of January 31, 1936, executed between the Company and Fuller Building Corporation pursuant to the Plan of Reorganization hereinabove mentioned, a certified copy of which Class B Common Stock Agreement has been filed with the Trustee.

151
152 TO HAVE AND TO HOLD THE SAME IN TRUST, NEVERTHELESS, subject to the provisions of the said Class B Common Stock Agreement for the cancellation of Class B Common Stock and Voting Trust Certificates representing such stock, to secure the performance by the Company of its Trust Agreement dated as of July 1, 1935, providing for the New Debentures; and of the guarantees by the Company of the payment of the sinking fund, interest, and principal at maturity of the Old Debentures issued under the Trust Agreement dated as of January 1, 1929, executed and delivered to The National City Bank of New York as Trustee by G. A. F. Realty Corporation and to be held subject to the reservations, terms and conditions in this Pledge Agreement expressly set forth and subject to which the said transfers and deliveries of said stock represented by said Voting Trust Certificates are made by the Company and accepted by the Trustee.

• • • • •

*Exhibits Received into Evidence.**Earl Exhibit B.*

ARTICLE III

Cancellation of Class B Common Stock Pledged
Hereunder.

Section 1. In the event that Fuller Building Corporation fails to earn in each calendar year, commencing January 1, 1935, 2½% interest on its Loan Certificates representing its First (Closed) Mortgage Loan due January 1, 1949 and New York City real estate taxes on the mortgaged premises therein described, the Class B Common Stock and/or Voting Trust Certificates pledged hereunder are subject to cancellation without compensation to the holder thereof all as provided in and pursuant to the Class B Common Stock Agreement hereinabove mentioned. In the event that Class B Common Stock of Fuller Building Corporation and/or Voting Trust Certificates pledged hereunder are cancelled pursuant to the Class B Common Stock Agreement hereinabove mentioned, the Company shall be under no obligation or liability whatsoever to supply further security under this Pledge Agreement which shall thereupon terminate.

Section 2. In the event, pursuant to the Class B Common Stock Agreement hereinabove mentioned, the Company, or the Company and Fuller Building Corporation jointly, deliver a written request or order to the Trustee to surrender the Class B Common Stock and/or Voting Trust Certificates pledged hereunder for cancellation, the Trustee covenants and agrees forthwith and without delay or question to surrender, and shall forthwith then so surrender, said Class B Common Stock and/or Voting Trust Certificates to Fuller Building Corporation or to the Voting Trustees, as the case may be, for cancellation.

*Exhibits Received into Evidence.**Earl Exhibit B.*

1156 Section 3. In the event that pursuant to Section 2 of this Article III the Trustee surrenders the Class B Common Stock and/or Voting Trust Certificates pledged hereunder to Fuller Building Corporation or to the Voting Trustees, as the case may be, for cancellation, the Trustee shall be relieved from any and all further liability with respect thereto, and Trustee shall be fully protected for so acting, and shall incur no liability for acting in accordance with the written request and order specified in the preceding Section 2 hereof.

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*Exhibits Received into Evidence.***Earl Exhibit D.**

[as abridged by stipulation dated September 13, 1939].

**UNITED STATES REALTY AND IMPROVEMENT
COMPANY**

and

FULLER BUILDING CORPORATION**CLASS B COMMON STOCK AGREEMENT**

Dated as of January 31, 1936

AGREEMENT, dated as of January 31, 1936, between UNITED STATES REALTY AND IMPROVEMENT COMPANY, a corporation organized and existing under the laws of the State of New Jersey (hereinafter referred to as "U. S. Realty"), party of the first part, and FULLER BUILDING CORPORATION, a corporation organized and existing under the laws of the State of New York (hereinafter referred to as the "Company"), party of the second part;

WHEREAS, the Company was organized pursuant to a Plan of Reorganization adopted and confirmed by an order of the United States District Court for the Southern District of New York, dated October 21, 1935, in proceedings under Section 77B of the Bankruptcy Act for the reorganization of a corporation entitled "In the Matter of G. A. F. Realty Corporation, Debtor, No. 61331";

WHEREAS, pursuant to said Plan and said order the Company is to issue all of its authorized capital stock, including its entire issue of Class B Common Stock (8576 shares) to U. S. Realty, subject for ten years to a Voting

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*Exhibits Received into Evidence.**Earl Exhibit D.*

62 Trust Agreement and upon certain terms and conditions contained in the aforesaid Plan and to be contained in this Agreement (sometimes referred to as the "Class B Common Stock Agreement"); and

63 WHEREAS, the Company is now the owner in fee of the premises situated in the Borough of Manhattan, City, County and State of New York, on the northeast corner of 57th Street & Madison Avenue, hereinafter referred to as the "mortgaged premises," and more fully described in the Amended Indenture dated as of January 31, 1936, between the Company and The National City Bank of New York, as Trustee, hereinafter referred to as the First (Closed) Mortgage Loan;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That, in consideration of the premises and the covenants contained herein, IT IS MUTUALLY COVENANTED AND AGREED:

64 1. The Company will issue and U. S. Realty will accept said Class B Common Stock (or Class B Voting Trust Certificates, if any,), subject to the following terms and conditions:

(a) In the event that New York City real estate taxes on the premises subject to the lien of the First (Closed) Mortgage Loan of G. A. F. Realty Corporation assumed, as modified pursuant to the Plan of Reorganization hereinabove mentioned, by the Company and interest on said mortgage at the rate of $2\frac{1}{2}\%$ per annum commencing January 1, 1935,

*Exhibits Received into Evidence.**Earl Exhibit D.*

are not paid in full in any calendar year within fifteen days (15) after said real estate taxes or interest become due, the Company, at the discretion of its Board of Directors, shall be entitled to request and to obtain (at any time thereafter prior to the first day of July of the calendar year next following the calendar year in which payment was not made) the surrender for cancellation without compensation of the Class B Common Stock or Class B Voting Trust Certificates, if any, of the Company, provided, however, that in the event a sum equal to the aggregate of the aforesaid real estate taxes and $2\frac{1}{2}\%$ interest is in any calendar year earned but not paid by the Company (such earnings to be determined as hereinafter specified), the Company shall not by reason of such non-payment of taxes or interest in such calendar year be entitled to request and to obtain the surrender for cancellation without compensation of said Class B Common Stock or Class B Voting Trust Certificates, if any; and provided further, that in the event that there shall be a deficiency in any calendar year with respect to said real estate taxes and $2\frac{1}{2}\%$ interest, U. S. Realty or its successors or assigns or the then registered holders of said Class B Common Stock or Class B Voting Trust Certificates, if any, shall have the right to cure such deficiency by promptly donating to the Company the entire amount of such deficiency in cash and thereupon the Company shall not be entitled to obtain the surrender of said Class B Common Stock or Voting Trust Certificates, if any, for the failure of the Company to pay such taxes or interest in such calendar year.

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*Exhibits Received into Evidence.**Earl Exhibit D.*

IV. So long as said Class B Common Stock (and Voting Trust Certificates, if any,) shall be pledged with a trustee for the benefit of holders of Debentures, (both Debentures issued under a Trust Agreement executed by G. A. F. Realty Corporation to The National City Bank of New York as Trustee, dated as of January 1, 1929, and Debentures issued under a Trust Agreement executed by U. S. Realty to The National City Bank of New York, as Trustee, dated as of July 1, 1935), and so long as, pursuant to the provisions of this Agreement, the Company shall be entitled to the surrender of Class B Common Stock (and Voting Trust Certificates, if any) for cancellation and extinguishment, U.S.Realty will promptly execute, acknowledge and deliver, upon written request of the company, individually or jointly with the Company, orders and instructions to such pledgee of the Class B Common Stock (and Voting Trust Certificates, if any,) for the surrender by such pledgee of such stock (and Voting Trust Certificates, if any) to the Company, and will execute such other documents and instruments as the Company may reasonably require to evidence the cancellation and termination of all the right, title and interest of U. S. Realty in and to said Class B Common Stock (and Voting Trust Certificates, if any,). So long as the pledge for the benefit of holders of Debentures continues, and so long as the Pledge Agreement shall require the trustee-pledgee to surrender said Class B Common Stock (and Voting Trust Certificates, if any,) in compliance with a request and demand made either by U. S. Realty alone or by U. S. Realty and the Company jointly, U. S. Realty shall not be under any obligation to surrender phys-

*Exhibits Received into Evidence.**Earl Exhibit D.*

ically said Class B Common Stock (and Voting Trust Certificates, if any,) in the event that the Company be entitled, pursuant to the provisions of this Agreement, to a surrender and cancellation thereof.

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V. If said Class B Common Stock (and Class B Voting Trust Certificates, if any) are not pledged as security for the Debentures above mentioned, U. S. Realty, so long as it shall have any direct or indirect right, title, or interest in said Class B Common Stock (and Class B Voting Trust Certificates, if any) shall at all times be under the obligation to cause said Class B Common Stock (and Voting Trust Certificates, if any) to be surrendered physically in the event that the Company is entitled to a surrender thereof for cancellation and extinguishment pursuant to the provisions of this Agreement.

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[Earl Exhibits A and C have been omitted pursuant to stipulation].

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**Notice of Appeal by Securities and Exchange
Commission, Dated August 3, 1939.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

174

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor
SECURITIES AND EXCHANGE
COMMISSION,
Intervenor.

In Proceedings For
An Arrangement;
Index No. 74023

NOTICE OF APPEAL

Notice is hereby given that the Securities and Exchange Commission, intervenor herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the following orders of the United States District Court for the Southern District of New York, made by United States District Judge Vincent L. Leibell and entered in this proceeding on July 28, 1939, and appeals from each and every part of the said orders as well as from the whole thereof:

(1) The order denying in all respects the motions of the Securities and Exchange Commission (a) to vacate the order finding the Debtor's petition to have been properly filed under Section 322 of the Bankruptcy Act, (b) to dismiss the Debtor's petition, (c) to deny confirmation of the Debtor's proposed arrangement, and (d) to dismiss this proceeding; and

Notice of Appeal by Securities and Exchange Commission, Dated August 3, 1939.

(2) The order referring this proceeding to Hon. John E. Joyce, Referee in Bankruptcy of the United States District Court for the Southern District of New York.

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Dated, New York, N. Y., August 3rd, 1939.

EDMUND BURKE, JR.

Edmund Burke, Jr.

J. ANTHONY PANUCH

J. Anthony Panuch;

Attorneys for the Securities
and Exchange Commission,

120 Broadway,

New York, N. Y.

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[Original Filed on August 3, 1939.]

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**Notice of Appeal by Debtor, Dated
August 7, 1939.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of
**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**
Debtor
**SECURITIES AND EXCHANGE
COMMISSION,**
Intervenor.

In Proceedings For
An Arrangement
No. 74023

Notice is hereby given that the United States Realty and Improvement Company, the debtor herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the order of United States District Judge Vincent L. Leibell dated July 28, 1939, filed in the office of the Clerk of this Court on July 28, 1939, granting the motion of Securities and Exchange Commission to intervene herein, and from each and every part of said order.

Dated: August 7, 1939.

Yours, etc.,

WHITE & CASE,
By Joseph M. Hartfield
Attorney for Debtor
14 Wall Street,
New York City, N. Y.

[Original Filed on August 8, 1939.]

Debtor's Bond for Costs on Appeal.

NATIONAL SURETY CORPORATION
NEW YORK

No. 5188116

1183

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
IN THE SECOND CIRCUIT

In the Matter of
UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
 Debtor.

In Proceedings For
 An Arrangement
 No. 74023

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UNDERTAKING FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a New York Corporation, having an office and place of business at No. 110 John Street, in the City, County and State of New York, is held and firmly bound unto the Securities and Exchange Commission, in the sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars, to be paid to the said Securities and Exchange Commission, for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

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WHEREAS, on the 28th day of July, 1939, an order was entered in the above entitled proceeding;

AND the appellant, United States Realty and Improvement Company, feeling aggrieved thereby, appeals to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Debtor's Bond for Costs on Appeal.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the aforesaid order is affirmed or modified by the appellate court or if the appeal is dismissed, the appellant, United States Realty and Improvement Company, will pay all costs which may be awarded against it on said appeal.

DATED, New York, this 17th day of August, 1939.

NATIONAL SURETY CORPORATION

By A. B. Cataldo

Attorney-in-Fact.

And N. V. Tynan

Attorney-in-Fact.

STATE OF NEW YORK }
COUNTY OF NEW YORK. } ss.:

On this 17th day of August, 1939, before me personally appeared A. B. Cataldo, Attorney-in-Fact of the National Surety Corporation, with whom I am personally acquainted, and who, being by me duly sworn, says that he resides in Brooklyn, N. Y.; that he is the Attorney-in-Fact of the National Surety Corporation, the corporation described in and which executed the within instrument; that he knows the corporate seal of such Corporation; and that the seal affixed to the within instrument is such corporate seal and that it was affixed by order of the Board of Directors of said Corporation, and that he signed said instrument as Attorney-in-Fact of the said Corporation by like order. And said Attorney-in-Fact further stated that he is acquainted with N. V. Tynan, and knows him to be Attorney-in-Fact of said Corporation; that the signature of the said N. V. Tynan, subscribed

Debtor's Bond for Costs on Appeal.

to the said instrument is in the genuine handwriting of the said N. V. Tynan, and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended, issued to the National Surety Corporation his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law; and that such certificate has not been revoked.

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M. E. GEARITY

Notary Public for Kings Co.

Clk. No. 577, Reg. No. 1163

1190

Certificate filed in N. Y. Co.

No. 279, Reg. No. 1-G-163

Commission expires March 30, 1941.

COPY OF RESOLUTION

At a regular meeting of the Executive Committee of the National Surety Corporation, held at its offices in the City of New York, State of New York, on the 18th day of April, 1939, the following Resolution was unanimously adopted:

"RESOLVED, Albert L. Carr, A. B. Cataldo, P. L. Crafts, Vincent Cullen, P. R. Cummings, Joseph Donohue, Mildred Fackner, Harry A. Kearney, A. H. Kraus, R. MacLean, J. C. Murphy, Helen Petersen, O. C. Storbeck, J. H. Taylor, Wm. Twamley, A. P. Valenti, M. A. Verdrose, Edward W. Warnke, A. H. Wise and S. M. R. Wrightson, hereby designated the FIRST GROUP; and Harold Carr, M. E. Gearity, M. C.

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Debtor's Bond for Costs on Appeal.

92 Maloney, Katherine McFadden, Justin McGrath, Daniel Monaghan, A. Parlato, Joan C. Powell, Ellen Quinn, E. Rosasco, Marion Spiller and N. V. Tynan, hereby designated the SECOND GROUP, be and each of them is hereby appointed an Attorney-in-Fact of this Corporation and empowered to sign, seal, execute, acknowledge and deliver in its name, place and stead, any and all bonds, recognizances, contracts of indemnity and other conditional or obligatory undertakings; but the Corporation shall be bound on any such instrument only when signed by two of the persons named in the First Group, or by one of those named in the First Group and by one of those named in the Second Group, and when any such instrument is so signed, and sealed with the seal of the Corporation, it shall bind the Corporation as fully and to the same extent as if it were signed by the President of the Corporation, sealed with its seal and attested by its Secretary, the Corporation hereby ratifying and confirming all the acts of said Attorneys-in-Fact done pursuant to the power and authority herein given.

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STATE OF NEW YORK }
COUNTY OF NEW YORK. } ss.:

94 Joseph Donahue, being duly sworn, says that he is an Assistant Secretary of the National Surety Corporation; that he has compared the foregoing copy of Resolution with the original thereof, as recorded in the Minute Book of the said Corporation, and does hereby certify that the same is a true and correct transcript of the whole of the said original Resolution, that the same has not been revoked since its adoption, and that the parties who signed the attached instrument are

Debtor's Bond for Costs on Appeal.

still Attorneys-in-Fact of the National Surety Corporation.

Subscribed and sworn to before me this
17th day of August, 1939.

1295

Joseph Donahue,
Assistant Secretary

M. E. GEARITY

Notary Public for Kings Co.

Clt. No. 577, Reg. No. 1163

Certificate filed in N. Y. Co.

No. 279, Reg. No. 1-G-163

Commission expires March 30, 1941

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**Stipulation Consolidating Records
on Appeal.**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of

**UNITED STATES REALTY AND
IMPROVEMENT COMPANY,**

Debtor.

In Proceedings For
An Arrangement
No. 74023

It is hereby stipulated and agreed by and between the attorneys for the undersigned parties to this proceeding, with respect to the appeal taken by the Securities and Exchange Commission to the Circuit Court of Appeals for the Second Circuit by Notice of Appeal dated August 3, 1939 from two orders made and entered by this Court on July 28, 1939, and the appeal taken by the debtor by Notice of Appeal dated August 7, 1939 from an order made and entered by this Court on July 28, 1939, that the Records on Appeal be consolidated.

Dated, New York, September 6, 1939.

White & Case,
Attorneys for Debtor.

J. Anthony Panuch,
Attorney for Securities and
Exchange Commission.

Davis, Polk, Wardwell, Gardiner & Reed,
Attorneys for Guaranty Trust
Company of New York.

Stipulation Consolidating Records on Appeal.

Simpson, Thacher & Bartlett,
Attorneys for Beha Committee.

Ralph Montgomery Arkush,
Attorney for Grimm Committee.

1201

William Evans Bardusch,
Attorney for Ralph W. Earl
and Donald M. Halsted.

I. Newton Brozan,
Attorney for Grace Kreusser
and Harriet Mnuchin.

So Ordered

Augustus N. Hand
U. S. C. J.

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Stipulation as to Contents of Record.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
In Proceedings For An Arrangement
No. 74023**

[SAME TITLE]

It is hereby stipulated by and between the undersigned parties to this proceeding that the following parts of the record, proceedings, and evidence be included in the consolidated record on appeal with respect to the appeals taken to the United States Circuit Court of Appeals for the Second Circuit by the Securities and Exchange Commission by Notice of Appeal dated August 3, 1939, from two orders of this Court made and entered on July 28, 1939, and by the Debtor by Notice of Appeal dated August 7, 1939, from an order of this Court made and entered on July 28, 1939:

1. Debtor's Petition for Arrangement, filed May 31, 1939, including the following exhibits attached thereto:

- (a) Exhibit A (pp. 14; 15; 17, except last 2 lines; 20, except first 4 lines; 21; 22, first 10 lines; 25, last 2 lines; 26; 27; 28; 29; 30; 31, first 4 lines; 36; 37; 38).
- (b) Exhibit B.
- (c) Exhibit C (omitting reverse side of form).
- (d) Exhibits D and E.
- (e) Exhibit G.
- (f) Exhibit H.

2. Order of Judge Vincent L. Leibell, approving Debtor's Petition for Arrangement, dated May 31, 1939.

Stipulation as to Contents of Record.

3. Memorandum and outline of Securities and Exchange Commission, dated July 5, 1939.
4. (a) Order to show cause re intervention by Securities and Exchange Commission, made by Judge Vincent L. Leibell and dated July 18, 1939. 1207
- (b) Motion of Securities and Exchange Commission for leave to intervene, verified July 18, 1939.
- (c) Answer of Debtor to motion of Securities and Exchange Commission for leave to intervene, verified July 20, 1939.
- (d) Order of Judge Vincent L. Leibell granting motion of Securities and Exchange Commission for leave to intervene, dated July 28, 1939. 1208
5. (a) Order to show cause re motions of Securities and Exchange Commission to dismiss petition and proceedings, made by Judge Vincent L. Leibell and dated July 18, 1939.
- (b) Motions of Securities and Exchange Commission to dismiss petition and proceedings.
- (c) Answer of Debtor to motion of Securities and Exchange Commission to dismiss petition and proceedings, dated July 20, 1939.
- (d) Order of Judge Vincent L. Leibell denying motions of Securities and Exchange Commission to dismiss petition and proceedings, dated July 28, 1939. 1209
6. Order of Judge Vincent L. Leibell referring proceeding to Referee, dated July 28, 1939.
7. The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on June 28, 1939:

Stipulation as to Contents of Record.

Page	1, line	1,	to	Page	3, line	12
"	14,	"	14,	"	20,	" 8
"	23,	"	18,	"	26,	" 18
"	32,	"	20,	"	38,	" 1
"	38,	"	13,	"	42,	" 2
"	46,	"	4,	"	46,	" 12
"	48,	"	3,	"	61,	" 24
"	64,	"	8,	"	64,	" 25

8 The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent-L. Leibell on July 7, 1939:

Page	69, line	1,	to	Page	75, line	17
"	96,	"	1,	"	"	3
"	100,	"	2,	"	101,	" 8
"	101,	"	18,	"	101,	" 19
"	102,	"	1,	"	145,	" 14
"	145,	"	18,	"	159,	" 20
"	161,	"	1,	"	181,	" 12
"	188,	"	9,	"	194,	" 19
"	195,	"	4,	"	197,	" 6; line 14
"	197,	"	24,	"	198,	" 6
"	198,	"	14,	"	198,	" 19
"	199,	"	15,	"	201,	" 12
"	203,	"	2,	"	215,	" 18
"	216,	"	5,	"	226,	" 15
"	226,	"	22,	"	230,	" 25
"	231,	"	4,	"	242,	" 22
"	244,	"	6,	"	244,	" 11
"	251,	"	15,	"	253,	" 6
"	255,	"	15,	"	255,	" 18

Stipulation as to Contents of Record.

9. The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 10, 1939:

1213

Page 261, line 1,	to	Page 262, line 14
" 275, " 10,	"	" 276, " 3
" 276, " 10,	"	" 280, " 11
" 281, " 5,	"	" 285, " 25
" 287, " 4,	"	" 287, " 17
" 287, " 23,	"	" 289, " 11
" 292, " 18,	"	" 293, " 16

10. The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 20, 1939:

1214

Page 294, line 1,	to	Page 296, line 22
" 297, " 8,	"	" 304, " 25
" 337, " 7,	"	" 338, " 9
" 340, " 5,	"	" 351, " 21
" 352, " 12,	"	" 353, " 5
" 354, " 25,	"	" 356, " 7

11. The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 27, 1939:

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Page 387, line 1,	to	Page 388, line 12
" 388, " 20,	"	" 394, " 17
" 394, " 24,	"	" 395, " 18
" 395, " 20,	"	" 430, " 21

12. The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 28, 1939:

Stipulation as to Contents of Record.

Page 432, line 1, to Page 434, line 10
 438, " 8, " " 442A, " 3

12 13 The following exhibits received in evidence at the meeting of creditors before Judge Leibell:

- a. Debtor's Exhibit 1
- (b) Debtor's Exhibit 2
- (c) Debtor's Exhibit 3
- (d) Debtor's Exhibit 4
- (e) Debtor's Exhibit 6
- (f) Debtor's Exhibit 10
- (g) Earl Exhibit B (pp. 1; 2; 3, first 5 lines; 7, beginning with Article III; 8, ending with Article III.)
- (h) Earl Exhibit D (pp. 1; 2, except last 2 lines; 8, beginning with Paragraph IV; 9, ending with Paragraph V.)

1217 14 Notice of appeal by Securities and Exchange Commission, dated August 3, 1939.

15 Notice of appeal by Debtor, dated August 7, 1939.

16 Debtor's bond for costs of appeal.

1218 17 Stipulation consolidating records on appeal.

18 Stipulation as to contents of record.

19 Stipulation as to transcript of record.

20 Clerk's certificate as to transcript of record.

Stipulation as to Contents of Record.

It is further stipulated and agreed that when the foregoing parts of the record, proceedings, and evidences are printed, except as hereinafter provided, the undersigned parties will stipulate that the same is a true transcript of the record of the District Court with respect to said appeals, without prejudice to the reservation of rights hereinafter referred to.

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It is further understood that the Securities and Exchange Commission and the Debtor are not in agreement as to the inclusion of certain parts of the proceedings, papers, and evidence which have been included in the consolidated record on appeal, and each of said parties reserves all its right under Federal Rule of Civil Procedure 75(e) with respect to portions of the consolidated record on appeal which the said parties respectively believe should not have been included pursuant to said Rule 75(e), as follows:

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1. The Securities and Exchange Commission states that the following should not have been included in the consolidated record on appeal:

(a) Memorandum and outline of Securities and Exchange Commission dated July 5, 1939.

(b) The following portions of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 7, 1939: p. 253, line 1, to p. 253, line 6; p. 255, line 15, to p. 255, line 18.

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(c) The following portions of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 20, 1939:

Stipulation as to Contents of Record.

Page 294, line 1, • to	Page 296, line 22
" 297, " 8, "	" 304, " 25
" 337, " 7, "	" 338, " 9
" 340, " 5, "	" 351, " 21
" 352, " 12, "	" 353, " 5
" 354, " 25, "	" 356, " 7

2. The Debtor states that the following should not have been included in the consolidated record on appeal:

- (a) All of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on June 28, 1939, except the following: p. 41 line 1, to p. 3, line 3.
- (b) All of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 7, 1939, except the following: p. 69, line 1, to p. 70; p. 74, line 5, to p. 75 line 1.
- (c) All of the Stenographer's Transcript of the meeting of creditors held before Judge Vincent L. Leibell on July 10, 1939, except the following: p. 261, line 1, to p. 262, line 14; p. 281, line 5, to p. 282, line 8.
- (d) All of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 20, 1939, except the following: pp. 294 to 296; 298 to 299; 337 to 338; 345 to 351.
- (e) All of the Stenographer's Transcript of the hearing held before Judge Vincent L. Leibell on July 27, 1939, except the following:

Stipulation as to Contents of Record.

Page 387, line 1, to Page 388, line 12
 " 393, " 20, " " 394, " 17
 " 396, " 11, " " 397, " 7
 " 425, " 14, " " 428, " 12

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(f) All of the exhibits received in evidence at the meeting of creditors before Judge Leibell.

It is further stipulated and agreed that Debtor's Exhibit 10, consisting of nine annual reports to stockholders, shall not be printed but shall be deemed to be part of the consolidated record on appeal; and that any of the parties to the appeal may refer to said exhibit, or any portion thereof, in which event three copies of the said exhibit or said portion thereof shall be made available by the Debtor for the use of the appellate court.

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Dated New York, N. Y., September 13, 1939.

White & Case,
 Attorneys for Debtor:

J. Anthony Panuch,
 Attorney for Securities and
 Exchange Commission.

Davis, Polk, Wardwell, Gardiner & Reed,
 Attorneys for Guaranty Trust
 Company of New York.

Simpson, Thacher & Bartlett,
 Attorneys for Beha Committee.

1227

Ralph Montgomery Arkush,
 Attorney for Grimm Committee.

I. Newton Brozan,
 Attorney for Grace Kreusser
 and Harriet Mnuchin.

William Evans Bardusch,
 Attorney for Ralph W. Earl
 and Donald M. Halsted.

Stipulation,

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In the Matter of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor

In Proceedings For
An Arrangement
No. 74023

It is hereby stipulated and agreed that the foregoing
is a true transcript of the record in the District Court,

Dated, New York, N. Y., October , 1939.

WHITE & CASE,
Attorneys for Debtor.

J. ANTHONY PANUCH,
Attorney for Securities and Exchange
Commission.

**DAVIS, POLK, WARDWELL,
GARDINER & REED,**
Attorneys for Guaranty Trust Company
of New York.

SIMPSON, THACHER & BARTLETT,
Attorneys for Beha Committee.

RALPH MONTGOMERY ARK
Attorney for Grimm Committee.

WILLIAM E. BARDUSCH,
Attorney for Ralph W. Earl and
Donald M. Halsted.

I. NEWTON BROZAN,

Clerk's Certificate.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

1231

In the Matter of

UNITED STATES REALTY AND
IMPROVEMENT COMPANY,
Debtor

In Proceedings For
An Arrangement
No. 74023

I, George J. H. Follmer Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

1232

In Testimony whereof, I have caused the seal of the said District Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of October in the year of our Lord one thousand nine hundred and thirty-nine, and of the independence of the said United States the one hundred and sixty-third.

GEORGE J. H. FOLLMER.
Clerk.

1233

(SEAL)

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY, DEBTOR

SECURITIES AND EXCHANGE COMMISSION, APPELLANT, AND UNITED
STATES REALTY AND IMPROVEMENT COMPANY, APPELLEE

In Proceedings for an Arrangement under Chapter XI of
the Bankruptcy Act

SIRS: Please take notice that United States Realty and Improvement Company will move upon the annexed Petition to Dismiss the Appeals of the Securities and Exchange Commission from two orders of the United States District Court for the Southern District of New York in the above-entitled action on November 6, 1939, at 10:30 o'clock A. M., in Room 1700 of the United States Court House, Foley Square, City, County, and State of New York.

Dated: New York, N. Y., November 1, 1939.

Yours, etc.,

WHITE & CASE,

*Attorneys for United States Realty and
Improvement Company, Debtor.*

14 Wall Street, New York, N. Y.

To:

Edmund Burke, Jr., Esq. and J. A. Panuch, Esq., Attorneys for Securities and Exchange Commission, 120 Broadway, New York, N. Y.

Messrs. Davis Polk Wardwell Gardiner and Reed, Attorneys for Guaranty Trust Company of New York, as Mortgagee, 15 Broad Street, New York, N. Y.

Messrs. Simpson, Thacher & Bartlett, Attorneys for Bela Committee, 120 Broadway, New York, N. Y.

Ralph Montgomery Arkush, Esq., Attorney for Grimm Committee, 15 Broad Street, New York, N. Y.

William Evans Bardusch, Esq., Attorney for Ralph W. Earl and Donald M. Halsted, 63 Wall Street, New York, N. Y.

Messrs. MacLanahan, Merritt and Ingraham, Attorneys for Institutional Certificateholders Committee.

United States Circuit Court of Appeals for the Second Circuit

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY, DEBTOR

SECURITIES AND EXCHANGE COMMISSION, APPELLANT, AND UNITED STATES
REALTY AND IMPROVEMENT COMPANY, APPELLEE

In Proceedings for an Arrangement under Chapter XI of the
Bankruptcy Act

Petition of debtor to dismiss appeals

*To the Honorable the Judges of the United States Circuit Court of
Appeals for the Second Circuit:*

The petition of United States Realty and Improvement Company, Debtor herein, respectfully states:

1. The Debtor filed its Petition with the United States District Court for the Southern District of New York for an Arrangement under Chapter XI of the Bankruptcy Act on May 31, 1939. Said Court by an Order dated May 31, 1939, found inter alia in substance as follows: The Petition of the Debtor was properly filed under Section 322 of the Bankruptcy Act; United States Realty and Improvement Company was a debtor within the definition of Section 306 (3) of the Bankruptcy Act and the schedules annexed to said Petition were in full compliance with the provisions of the Bankruptcy Act. The Debtor was continued in possession until further order of the Court. Annexed to said Petition was a copy of an Arrangement proposed by the Debtor.

2. Thereafter on June 28, 1939, the first meeting of creditors in accordance with the act was held, which meeting was adjourned until July 7, 1939.

3. In the meantime in accordance with a memorandum dated July 5, 1939, and served on the Debtor by the Securities and Exchange Commission it appeared that representatives of the Commission had conferred with the Honorable Vincent L. Leibell, United States District Judge, and had obtained leave to appear in the proceeding as amicus curiae. Annexed to said memorandum was an "Outline of Matters to be Discussed by the Securities and Exchange Commission," stating in substance that it was the Commission's view that the Court was without jurisdiction under Chapter XI of the Bankruptcy Act and that the Order finding the Debtor's Petition properly filed should be vacated and that such Petition should be dismissed. Such views were alleged to be based in substance upon the following arguments: That the Debtor could not properly file a Petition under Chapter XI but would have to resort to Chapter X since the Debtor had securities outstanding in the hands of the public. On information and belief, the Securities and Exchange Commission has consistently failed to

recognize the essential difference in theory between an arrangement and a reorganization.

4. The Securities and Exchange Commission through its counsel participated as *amicus curiae* at the adjourned hearing on July 7, 1939, which hearing was adjourned to July 10, 1939.

5. The Securities and Exchange Commission again participated as *amicus curiae* at the hearing held on July 10, 1939, which hearing was adjourned to July 20, 1939, at which hearing the Securities and Exchange Commission again participated as *amicus curiae*. The District Court adjourned such hearing until July 27, 1939.

6. The District Court having indicated that it would not sustain the position which the Securities and Exchange Commission had maintained as *amicus curiae*, the Securities and Exchange Commission thereupon obtained two orders to show cause (1) why it should not be granted leave to intervene and (2) why the Petition of the Debtor should not be dismissed and the Order of May 31, 1939, finding the Petition properly filed should not be vacated.

7. Thereafter at a hearing held July 27, 1939, the District Court granted the Securities and Exchange Commission leave to intervene and made an Order to such effect on July 28, 1939. The District Court also denied the motion of the Securities and Exchange Commission to dismiss the proceedings, etc., and made an Order to such effect on the same date.

8. The District Court also by an Order dated July 28, 1939, referred the proceeding to a referee, to which Order the Securities and Exchange Commission took an exception.

9. The Securities and Exchange Commission by notice of appeal, dated August 3, 1939, appealed from two Orders of the District Court, dated July 28, 1939, the first being the one denying the motion of the Securities and Exchange Commission to dismiss, etc., and the second being the Order referring the proceedings to a referee. The Debtor by a notice of appeal dated August 8, 1939, appealed from the Order of the District Court dated July 29, 1939, granting leave to the Securities and Exchange Commission to intervene.

10. The consolidated record on appeal with respect to all of the foregoing three appeals will have been docketed and on file with this Court when this Petition is served and filed, and this Petition is based upon the matter contained in such record.

11. The Debtor is advised by counsel that the appeals of the Securities and Exchange Commission should be dismissed on the following grounds:

1. The Securities and Exchange Commission is a statutory body and has no authority, rights, powers, or duties except those conferred upon it by statute. There is no statute conferring upon it any authority, rights, powers, or duties in connection with a Chapter XI proceeding and its participation therein is *ultra vires*.

2. The right of appeal is a creature of statute and an appeal cannot be prosecuted without statutory authority. No statute grants the right to the Securities and Exchange Commission to appeal in this case.

3. The Securities and Exchange Commission is not a proper party to appeal since it has no real interest in the proceeding and since it is not aggrieved or adversely affected by either of the orders of which it complains.

4. The Securities and Exchange Commission is not a proper party to a Chapter XI proceeding and it was an error for the District Court to have permitted it to intervene. As an improper party it cannot appeal.

5. The Securities and Exchange Commission intervened in subordination to and in recognition of the proceeding and the jurisdiction of the court and therefore cannot attack such jurisdiction or appeal on any jurisdictional grounds. In addition, the Securities and Exchange Commission is estopped from making such attack or taking such appeal.

6. The Securities and Exchange Commission, as an intervenor, cannot seek to impeach a decree or order already made.

7. In any event, the Securities and Exchange Commission cannot appeal from the order referring the proceeding to a Referee since its intervention was expressly limited by the District Court to the jurisdictional ground and the original order in the proceeding.

12. Although the Debtor entered into a stipulation with the Securities and Exchange Commission with respect to the record on appeal the Debtor reserved its right to move this Court for costs against the Securities and Exchange Commission for causing such record to be excessive in length and to contain material which is entirely irrelevant and immaterial to its appeals in violation of the Rules of Civil Procedure.

13. No other application has been made for the relief herein requested.

Wherefore, the Debtor respectfully prays that the two aforesaid appeals of the Securities and Exchange Commission be summarily dismissed.

UNITED STATES REALTY AND IMPROVEMENT COMPANY.
By EDWIN J. BEINECKE, *President*.

Attest:

[SEAL]

F. M. SANDERS, *Secretary*.

STATE OF NEW YORK,

County of New York, ss:

Edwin J. Beinecke, being duly sworn, deposes and says, that he is an officer, to wit, President of United States Realty and Improvement Company, the Debtor in the above-entitled action; that the foregoing Petition is true of his own knowledge, except as to the matters therein

stated to be alleged on information and belief, and as to those matters he believes it to be true.

EDWIN J. BEINECKE.

Sworn to before me this 16th day of October 1939.

[SEAL]

WALTER E. ECKERT,
Notary Public Kings County.

Kings Co. Clerk's No. 44, Reg. No. 148. Certificates filed in New York Co. Clerk's No. 120, Reg. No. 0-E-73. Commission expires March 30, 1940.

United States Circuit Court of Appeals for the Second Circuit

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT
COMPANY, DEBTOR

SECURITIES AND EXCHANGE COMMISSION, INTERVENER, APPELLANT,

v.

UNITED STATES REALTY AND IMPROVEMENT COMPANY,
DEBTOR, APPELLEE

*Answer of Securities and Exchange Commission to motion to
dismiss appeal*

*To the Honorable the Judges of the United States Circuit Court of
Appeals for the Second Circuit:*

The Answer of the Securities and Exchange Commission to the motion of United States Realty and Improvement Company, the Debtor, to dismiss an appeal taken by the Commission, respectfully states:

I

On May 31, 1939, the Debtor filed with the United States District Court for the Southern District of New York, a petition under Section 322 of the Bankruptcy Act of 1898, as amended, proposing an Arrangement under Chapter XI of that Act. Schedules attached to the petition stated that the Debtor had assets of \$23,378,988.90, liabilities of \$5,538,985.05, and contingent liabilities in excess of \$3,900,000. The Debtor has outstanding in the hands of the public four classes of securities, including \$2,339,000 of debentures, 900,000 shares of stock listed on the New York Stock Exchange, and a guarantee of \$3,710,500 of first mortgage certificates.

II

By order of the District Court, dated July 28, 1939, the Commission was permitted to intervene in this proceeding for the following purposes:

1. To move the District Court (a) to dismiss the Debtor's petition initiating the proceeding under Chapter XI, (b) to deny confirmation of the Arrangement proposed by the Debtor, and (c) to dismiss the proceeding under Chapter XI;

2. To take such other steps as may be appropriate to contest the jurisdiction of the District Court over the proceeding under Chapter XI; and

3. To enable the Commission to appeal from any order respecting its motions and other steps contesting the jurisdiction of the District Court.

III

By notice of appeal, dated August 3, 1939, the Commission, in its capacity as an intervener in this proceeding, appealed to this Court from two orders of the District Court entered on July 28, 1939. The first of these orders denied motions¹ of the Commission to dismiss the Debtor's petition and the proceeding. The motions were based on the ground that the District Court was without jurisdiction because the provisions of Chapter XI do not apply to a corporation, such as the Debtor, which has securities outstanding in the hands of the public, and that such a corporation is required to file under Chapter X if it desires to adjust its obligations under the provisions of the Bankruptcy Act.

The second order from which the Commission has appealed is an order referring the proceeding to a referee, entered over the objection of the Commission that continuation of the proceeding was improper because of the District Court's lack of jurisdiction.

IV

Subsequently, by notice of appeal dated August 7, 1939, the Debtor appealed to this Court from the order permitting the Commission to intervene in this proceeding. By stipulation of the parties dated September 6, 1939, approved by a judge of this Court, the Commission's appeal from the orders overruling its jurisdictional objections, and the Debtor's appeal from the intervention order, are before this Court on a single consolidated record, filed on November 1, 1939. Both appeals are awaiting hearing and determination by this Court.

V

The Commission filed in this Court on November 1, 1939, a brief supporting the appeal which it has taken. On the same day, the Debtor filed a brief in connection with its appeal from the order granting leave to the Commission to intervene. On November 10, 1939, the Commission filed an answering brief supporting the order of intervention.

¹ The Commission made four motions: (1) to dismiss the proceeding; (2) to dismiss the Debtor's petition; (3) to vacate the order of May 31, 1939; and (4) to deny confirmation of the Debtor's proposed arrangement.

VI

These appeals raise jurisdictional questions of first impression affecting the Debtor's security holders, the general investing public, and the Commission. The continuance of this proceeding will have the effect of denying to the investors in the Debtor the safeguards specially embodied in Chapter X of the Bankruptcy Act for their protection. It will also have a prejudicial and conclusive effect upon the Commission in preventing it from performing the duties prescribed by Congress in Chapter X of the Bankruptcy Act in connection with the reorganization of corporations having a public investor interest. The general investing public will likewise be adversely affected by the precedent established.

VII

The Commission has argued in its brief supporting the present appeal that the District Court should have dismissed the Debtor's petition and this proceeding for the reason that—

1. It was the intention of Congress that Chapter X, not Chapter XI, should be the mechanism for readjusting the obligations of corporations whose securities are held by the public. That intention is demonstrated by the legislative history of the two chapters and by their content and internal structure.

2. It was the duty of the District Court to construe the statute to effectuate the Congressional intention.

3. The facts of this case (as contained in the consolidated record on appeal which has been made a part of the present motion) demonstrate that corporations with securities held by the public cannot be properly reorganized under Chapter XI.

VIII

The Commission denies that it is without standing to take this appeal or that its intervention was improper. The Commission represents that by reason of its intervention and its interests in the jurisdictional issues presented by this proceeding, it properly appealed to this Court from the adverse determinations of the District Court.

Wherefore, the Securities and Exchange Commission respectfully prays that the Debtor's motion to dismiss this appeal be denied.

SECURITIES AND EXCHANGE COMMISSION,
 (Sgd.) EDMUND BURKE, JR.
 Edmund Burke, Jr.
 (Sgd.) J. ANTHONY PANUCH.
 J. Anthony Panuch.

STATE OF NEW YORK,

County of New York, ss:

J. Anthony Panuch, being duly sworn, deposes and says:

That he is Special Counsel to the Reorganization Division of the Securities and Exchange Commission; that the Securities and Exchange Commission has authorized and directed the filing of the within Answer.

That he has read the foregoing Answer and knows the contents thereof; that the same is true of his knowledge, except as to those matters stated therein to be alleged upon information and belief, and that as to those matters he believes them to be true.

That the sources of deponent's information and the grounds of his belief stated in the within Answer to be alleged upon information and belief are records, documents, memoranda, reports, exhibits, and minutes of testimony in this proceeding and appeal.

(Sgd.) J. ANTHONY PANUCH.

J. Anthony Panuch.

Sworn to before me this 13th day of November 1939.

Notary Public.

United States Circuit Court of Appeals for the Second District

No. 178—October Term, 1939

(Argued December 6, 1939. Decided January 15, 1940)

IN THE MATTER OF UNITED STATES REALTY AND INVESTMENT COMPANY,
DEBTOR

SECURITIES AND EXCHANGE COMMISSION, APPELLANT, and UNITED
STATES REALTY AND IMPROVEMENT COMPANY, APPELLEE

UNITED STATES REALTY AND IMPROVEMENT COMPANY, APPELLANT, and
SECURITIES AND EXCHANGE COMMISSION, APPELLEE

Appeals from the District Court of the United States for the Southern
District of New York

In proceedings for an arrangement under chapter XI of the Bankruptcy Act. The debtor has appealed from an order permitting Securities and Exchange Commission to intervene; the Commission has appealed from an order denying its motion to dismiss the proceeding for lack of jurisdiction and also from an order referring the proceeding to a referee in bankruptcy. The three appeals were consolidated and heard upon a single record. The debtor has moved to dismiss the appeals taken by the Commission. Motion granted; order of intervention reversed.

Before SWAN, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

WHITE & CASE, Attorneys for the Debtor; **Joseph M. Harfield**, **Joseph A. Bennett**, **Henry M. Marx**, and **Charles W. Dibbell**, of Counsel. **CHESTER T. LANE**, General Counsel, and **MARTIN RIGER**, **SAMUEL H. LEVY**, **RAOUL BERGER**, **GEORGE ZOLOTAR**, and **HOMER KRIPKE**, Attorneys for Securities and Exchange Commission; **J. Anthony Panuch**, of Counsel.

SWAN, Circuit Judge: This is a proceeding for an arrangement under chapter XI of the Bankruptcy Act. It was commenced by petition filed by United States Realty and Improvement Company, hereafter called the debtor. The debtor is a New Jersey corporation having its principal place of business within the city of New York; its business consists in the management and ownership of investments in real estate. It has substantial assets and liabilities and its capital stock and certain other securities are outstanding in the hands of the public. By this proceeding it seeks to obtain an extension and modification of one class of its unsecured obligations, namely, its guaranty of the publicly held mortgage certificates, in the amount of some \$3,700,000, of its subsidiary, Trinity Buildings Corporation of New York (for brevity hereafter called Trinity); all other unsecured obligations the debtor proposes to pay as they fall due. The mortgage against which the guaranteed certificates were issued was to mature June 1, 1939, and the debtor's plan contemplates that the mortgagor, Trinity, will institute a proceeding under the Burchill Act (sections 121-3, N. Y. Real Property Law) in a state court to obtain a modification of the mortgage to conform it to the debtor's guaranty as modified under the arrangement.

By order entered on May 31, 1939, the date of the filing of the debtor's petition, the district court found, among other things, that the petition was properly filed under section 322 of the Act, 11 U. S. C. A. § 722, and directed that the debtor be continued in possession of its assets and that a meeting of its creditors be convened before the court on June 28, 1939. Early in July counsel for the Securities and Exchange Commission obtained permission from the district judge to present as *amicus curiae* the contention that the order of May 31st should be vacated and the proceeding dismissed for lack of jurisdiction. As *amicus curiae*, counsel for the Commission pressed the argument at several hearings that the debtor could not properly file a petition for an arrangement under chapter XI but must resort to a reorganization under chapter X because it had securities outstanding in the hands of the public. After the judge had indicated that this contention would not be sustained, the Commission moved for leave to intervene in the proceeding for the purpose of moving to vacate the order of May 31st, to deny confirmation of the debtor's proposed arrangement and to dismiss the proceeding. After further argument the court, on July 28, 1939, entered three orders. The first granted the Commission leave to intervene for the purpose of contesting jurisdiction of the court over this proceeding under chapter XI, "and for the purpose of enabling the said Commission to appeal from any order made in this proceed-

ing with respect thereto"; the second denied the motions of the Commission to vacate the order finding the debtor's petition to have been properly filed under section 322 and to dismiss the proceeding for lack of jurisdiction; and the third referred the proceeding to one of the referees in bankruptcy for such action as is required and permitted by the Bankruptcy Act. From the two latter orders the Commission appealed; subsequently the debtor appealed from the order allowing intervention. Thereafter the debtor moved in this court to dismiss the Commission's appeals. This motion was reserved until argument of the appeals.

These appeals raise interesting questions as to the interrelations of chapters X and XI of the Chandler Act and as to the right of the securities and Exchange Commission to intervene in an arrangement proceeding under chapter XI. If it be assumed that the Commission is properly here as an appellant, a majority of the court is of opinion that the orders from which it has appealed are right. The Commission attacks the jurisdiction of the court upon the theory that where a corporation seeks to effect an arrangement with respect to unsecured debts which are held by the investing public, as are the guaranteed certificates representing shares in Trinity's mortgage, it must proceed under chapter X and the court lacks jurisdiction to entertain a proceeding under chapter XI. However desirable such a limitation of the scope of an "arrangement" proceeding might be thought to be, we can find no warrant for it in the words of the statute or the history of the legislation.² Subdivision 1 of section 306 provides that "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms; and subdivision 3 defines debtor to mean a person who could become a bankrupt under section 4 of this Act and who files a petition under this chapter. The debtor is a person who could become a bankrupt under section 4. Concededly, therefore, the literal words of the statute authorize this proceeding. It may well be that the framers of the legislation contemplated that the arrangement procedure of chapter XI would be more likely to be availed of by small corporations and the reorganization procedure of chapter X by large corporations³; but no such limitation was written into the statute. Nor do we see any compelling reason for saying that a "large" corporation cannot obtain adequate relief under chapter XI because of the existence of outstanding securities in the investing public. Indeed, the statute seems to give preference to an arrangement proceeding, for it is provided in section 130 (7) that a petition under chapter 10 must state "the specific facts showing

² This question has been much discussed in periodical articles. See *Competing Systems of Reorganization*, 48 Yale L. J. 1334, and articles therein cited; *The Need for Amendment of the Chandler Act*, *Am. Bankruptcy Rev.*, Vol. A 3, p. 35; Oct. 1939.

³ The report of the Judiciary Committee to the House with respect to H. R. 8046 stated with respect to chapter XI, which combines features of sections 12 and 74: "The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12." House Report, 75th Cong., 1st sess., pp. 50-51.

need for relief under this chapter and why adequate relief can be obtained under chapter XI of this Act." See also §§ 146, 147. The latter section provides that a petition for reorganization improperly filed because adequate relief can be obtained by the debtor under chapter XI may be amended to comply with the requirements thereof and thereafter be deemed to have been originally filed thereunder. No corresponding provision is found in chapter X. There, section 376 (2) provides for adjudication of bankruptcy or dismissal of the proceeding if confirmation of the arrangement is refused. Accordingly, we find nothing in the statute to justify acceptance of the contention that the court lacked jurisdiction to entertain this proceeding. To read into chapter XI the limitation that it may be invoked only by small corporations without publicly held securities requires legislation rather than judicial interpretation. Whether the proposed arrangement meets the requirements necessary for confirmation (section 366) is a matter unrelated to jurisdiction and one on which the district court will later have to pass when the issue of confirmation is presented. We express no opinion concerning it at the present time.

We pass now to the right of the Commission to intervene in a chapter XI proceeding. No section of that chapter confers such a right. Section 208, however, expressly authorizes intervention by the Commission in a chapter X proceeding upon request of the debtor or upon its own motion if approved by the judge, but forbids appeal from any order entered in such a proceeding. The inclusion in chapter X of express permission to intervene and the omission of such a provision in chapter XI raises a strong implication against intervention by the Commission in the latter type of proceeding. In an arrangement proceeding the Commission has no special duties to perform such as are provided in section 172. The Commission argues that in order to protect its right to intervene in a chapter X proceeding it must be allowed to intervene in any chapter XI proceeding which it believes ought properly to have been brought under chapter X. But this proceeds upon the false premise that the Commission has a present right to protect. It has no such right. Its only right is to intervene if a chapter X proceeding is instituted. Until such a proceeding is instituted, the Commission has no interest whatever to protect. It cannot require a chapter X proceeding to be instituted, if the present chapter XI proceeding be maintained. Dismissal of the present proceeding would not necessarily result in a chapter X proceeding by either the debtor or its creditors; neither it nor they are compelled to initiate any court proceeding, and if one were initiated it might be in straight bankruptcy rather than in reorganization. The case at bar is not like those of *Pennsylvania v. Williams*, 294 U. S. 176, and *Gordon v. Ominsky*, 294 U. S. 186, in each of which the intervening representative of the Commonwealth of Pennsylvania claimed a right to the full possession and control of the assets of the insolvents, not merely a right

to advise or to protect the public interest. The Commission has no special interest to protect by intervention in the proceeding at bar.

Nor will its general interest in the welfare of holders of Trinity's mortgage certificates guaranteed by the debtor serve as a legitimate ground for intervention. A governmental agency has no general right of intervention "in the public interest." 2 Moore's Fed. Prac., p. 2327. We find nothing in Rule 24 of the Federal Rules of Civil Procedure or in the authorities cited in the briefs that points to a different conclusion. In one group of cases relied upon to support a general right of intervention in the government, the government claimed ownership of the land involved—a direct pecuniary interest—*Stanley v. Schwalby*, 147 U. S. 508; *Percy Summer Club v. Astle*, 110 F. 486 (C. C. N. H.); *Winola Lake and Land Co., Inc. v. Gorham*, 17 F. Supp. 75 (M. D. Pa.); or held title to the land in question as trustee for the Indians. *Brewer Oil Co. v. United States*, 260 U. S. 77; *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (C. C. A. 9). There was also a direct pecuniary interest in the cases in which the Commissioner of Internal Revenue was allowed to intervene in stockholder suits to enjoin the payment of taxes on the ground of the unconstitutionality of the taxing statute. *Helyering v. Davis*, 301 U. S. 619; *Davis v. Boston and M. R. R. Co.*, 89 F. (2) 368 (C. C. A. 1); *Norman v. Consolidated Edison Co. of New York*, 89 F. (2d) 619 (C. C. A. 2). In *New York v. New Jersey*, 256 U. S. 296, the United States intervened to protect its absolute control over navigable waters and its interest in adjacent public property which would be affected by the outcome of the suit. See p. 308. Nor does *Florida v. Georgia*, 17 How. 478, support the Commission's views. There the only question was whether the fact that the suit was between two states forbade intervention. See p. 492. In the *Exchange*, 7 Cranch 116, the United States never attempted to intervene as a party; it merely, through the United States attorney, filed a "suggestion," and was heard. The question of the United States attorney's right to appeal does not seem to have been raised. On the other hand, cases dealing generally with the right to intervene have demanded an interest in the result of the litigation of a direct and immediate character; the intervenor must stand to gain or lose directly by the decision of the court. See *Smith v. Gale*, 144 U. S. 509; *Lombard Inv. Co. v. Seaboard Mfg. Co.*, 74 F. 325, 326 (S. D. Ala.); *Glass v. Woodman*, 223 F. 621, 622 (C. C. A. 8); Moore's Federal Practice, pp. 2307 et seq. A somewhat analogous rule holds that one seeking review in the Supreme Court of a court judgment must have a personal as distinguished from an official interest in the relief sought, and in the federal right alleged to be denied. *Marshall v. Dye*, 231 U. S. 250, 257. The order permitting intervention brought up by the debtor's appeal should be reversed.

In considering at the outset the orders from which the Commission appealed we assumed for purposes of discussion that the Commission was properly an appellant. That assumption is challenged by the debtor's motion to dismiss. Had this proceeding been insti-

ated under chapter X and had the district judge decided that adequate relief could be obtained under a chapter XI proceeding and thereupon permitted an amendment of the petition and allowed the proceeding to continue as though originally filed thereunder, the Commission, though it had properly been allowed to intervene in the chapter X proceeding, could not have appealed from the order which determined that adequate relief could be obtained under a chapter XI proceeding. Section 208. That being so, it would be strange indeed if, after erroneously being allowed to intervene in the proceeding at bar, it could appeal from an order denying its motion to dismiss the proceeding. It would seem that the implication of section 208 not only forbids intervention in a chapter XI proceeding but also forbids appeal if intervention is erroneously permitted therein. But however that may be, we think the appeals should be dismissed because the Commission is not aggrieved by the orders appealed from; it has no interest that is affected by the litigation. In *Commercial Cable Staff's Association v. Lehman*, decided November 20, 1939, we held that intervention erroneously granted to an intervenor having no interest in reorganization litigation, gave it no right to appeal from orders approving the plan of reorganization. The motion to dismiss the Commission's appeals is granted. The order of intervention is reversed.

Before SWAN, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

CLARK, Circuit Judge (dissenting).

Chapter X was designed to insure the reorganization of large corporations with a maximum of safety for the investing public. Chapter XI was enacted to permit the rehabilitation of small commercial enterprises with a maximum of convenience for the oppressed debtor. Quite naturally, there are vast differences in both method and result between the procedures of the two chapters. Especially significant is the close judicial and administrative supervision over the activities of all persons specified by Chapter X, compared with the freedom of maneuver permissible under Chapter XI. I do not believe we are justified in opening a hole in the Chandler Act through which great corporations may escape from Chapter X. And I think it particularly unfortunate to do so by (as it seems to me) disregarding the interrelation of these two chapters, when read together in the light of their purpose, for a literal and mechanical interpretation of section or two of the Act specifying who may be bankrupts. I believe that X and XI are mutually exclusive, that a corporation which is amenable to one is not amenable to the other, and that the proper place for the United States Realty and Improvement Company is in a X proceeding. If this much be so, it was the duty of

A dissent ought to be brief, and therefore and because it is so well known, I refrain from recounting the persuasive legislative history of the law. Suffice it to say that the Chandler Act was passed after unusual study, including the extensive report of the Securities and Exchange Commission (pursuant to the direction of Congress) on the evils of past reorganization practices, and after a long congressional campaign, wherein every conceivable objection to the new procedure was pressed on the legislative body with the best vigor and persistence.

the district court, on its own motion or as soon as the matter was in any way called to its attention, to dismiss the XI petition.

Though the debtor contends otherwise, it seems hardly open to argument that had this company filed a voluntary petition under X, or had an involuntary petition been filed against it under X, the district court would have found it necessary to approve the petition as properly filed. The corporation's deficit stands at \$18,000,000. It has assets, based on June 1, 1939, market values, of \$7,076,515, and liabilities of \$5,551,416, excluding the contingent liability of over \$3,800,000, the modification of which is the sole object of this XI proceeding. There are almost 900 individual investors holding the share certificates representing this contingent liability. Public investors are interested in other debenture issues of the debtor, due in 1944, and the company's stock, of which 900,000 shares are outstanding, is listed and traded in on the New York Stock Exchange. In view of the corporation's size, character, and degree of insolvency, the appropriateness of a Chapter X proceeding, had a Chapter X proceeding been initiated, could not be denied.

Under § 146(2) of Chapter X, a petition filed under that Chapter may not be approved if the judge believes that adequate relief would be obtainable under Chapter XI. Had this debtor filed a Chapter X petition, the court would have been compelled to make an affirmative finding that adequate relief could not be obtained under XI. If the initiation of a X proceeding by this debtor would necessarily have led to such a finding, the same finding should be made when, as here, the debtor has filed under XI. The adequacy of relief under XI is clearly the same issue whether it arises in the setting of a Chapter X petition or in the setting of Chapter XI.

It is true that there is no provision in Chapter XI authorizing the court to dismiss petitions as improperly filed. But there is no such provision in the sections of the statute dealing with ordinary bankruptcies, and yet petitions have been dismissed and adjudications have been vacated over and over again, on grounds that were jurisdictional and on grounds that were not. See, particularly, *In re Nash, D. C. S. D. W. Va.*, 249 F. 375; *Blackstock v. Blackstock*, 8 Cir., 265 F. 249; *Vassar Foundry Co. v. Whiting Corp.*, 6 Cir., 2 F. 2d 240, 241 ("whether or not this objection is called jurisdictional, it is one upon which creditors must have a right to be heard"). This follows the well settled view that a bankruptcy proceeding is, after all, an action in equity and subject to the rules governing suits in equity. *Pepper v. Litton*, 60 S. Ct. 238; *Kroell v. New York Ambassador, Inc.*, — F. 2d —, December 18, 1939.

Whether a corporation with securities so widely and publicly held, with investors so scattered, so numerous, that they cannot be given adequate protection under the machinery of XI, can secure adequate relief for its financial distress, and whether any plan inaugurated under those limited agencies can properly satisfy the requirements of fairness, equity, and feasibility required of § 366 before the court may approve

it is an issue which the court must face and adjudicate. It is suggested, however, that this is not a matter of jurisdiction. Just what that chameleon word actually means here is not clear. If it means safe from collateral attack, that may be conceded. *Stoll v. Gottlieb*, 305 U. S. 165. If it means a necessary prerequisite to judicial action, then we are dealing with jurisdictional requirements. Without placing too much emphasis on a question-begging label, we can say that here we are dealing with prime necessities of judicial action, and that whenever the court finds they are not present, it is its duty to cease to act.

My brothers do not now choose to consider whether this debtor could properly have filed under Chapter X; instead they say that so long as the debtor could become a bankrupt, it has an indefeasible privilege to file under XI. Without discussing whether they are precluding the approval of a petition under X as to this debtor, they add that they see no reason why "a large" corporation with publicly held securities may not obtain adequate relief under XI. "Adequate relief" is a flexible phrase, but presumably it refers to relief for all the parties to the reorganization. "Adequate relief" is also an empty phrase, as empty as its companion "fair and equitable," until its meaning has been filled in by a series of judicial decisions. It seems to me clear that the investing public cannot obtain adequate relief in a Chapter XI proceeding; such, indeed, is the whole meaning and purpose of the safeguards imposed by Chapter X. An independent trustee is not required under XI, as it is under X; investors may not propose plans under XI, as they may under X; acceptances may be solicited prior to confirmation under XI, as they may not under X; voters are not entitled to the S. E. C.'s disinterested advice as an experienced financial counsel, as they are in X. Additional differences in protection can be and have been pointed out. *In re Reo Motor Car Co., Debtor*, No. 24816, D. C. E. D. Mich., October 1, 1939.

In addition to the problems presented by the wide public ownership of the debtor's securities, note may be made of another consideration which prevents these creditors from obtaining adequate relief under Chapter XI. It may be easily demonstrated that this debtor is insolvent. On the debtor's own figures, its assets barely exceed 7,000,000, while its liabilities total \$5,551,416, without including the "contingent" liability of \$3,800,000 here to be modified. The principal obligation which the debtor guaranteed matured on June 1, 1939, and this indebtedness is no longer contingent, as the institution of the XI proceedings so clearly shows. Since the company is insolvent, application of the principles of *Northern Pacific Ry. v. Boyd*, 228 U. S. 482, demands that the stockholders be eliminated, or their equity has disappeared, they have made no new cash contribution, and the preservation of their interest is not shown to be essential to the successful continuation of the enterprise. *Case v. Los Angeles Lumber Products Co.*, 60 S. Ct. 1.

Yet Chapter XI affords no method of eliminating stock interests, unless it be by importing the bankruptcy sale. Section 357, specifying what an arrangement may include, makes no mention of provisions affecting stock. That the principles of the Boyd case are nevertheless applicable to proceedings under Chapter XI can hardly admit of doubt: an arrangement may not be confirmed unless it is found to be "fair and equitable and feasible" [§366 (3)], words which we are told are words of art, incorporating the rules laid down in *Northern Pacific Ry. v. Boyd*, supra; *Case v. Los Angeles Lumber Products Co.*, supra. If creditors of this debtor may invoke the Boyd case in XI to eliminate the stockholders, yet find the machinery of XI powerless to accomplish the elimination, they may plausibly contend that in XI they cannot obtain adequate relief. And if the Boyd case is not the law of Chapter XI,⁵ perhaps that fact alone would be sufficient reason for declaring that for this debtor and its creditors,⁶ the relief offered by XI is inadequate.

If my brothers are correct it is possible for any large corporate debtor, untroubled by the necessity of adjusting a secured debt, to choose between proceeding under Chapter X and under Chapter XI. Far too often XI will be chosen, because of its undoubted swiftness and its happy immunity from judicial and administrative control. A temporary palliative for an incurable financial disease may often be obtained under XI by adjusting a single indebtedness, and the usually optimistic management may put off for a time the evil day of reckoning when the drastic remedies of Chapter X become inescapable. Here the district judge announced from the bench that he was of the opinion that a Chapter X reorganization would be preferable, and, upon being assured by counsel for a creditor group that an involuntary X petition would be filed immediately, he stated his intention to dismiss the XI proceedings. Counsel for the debtor and for other creditors interposed, and in open court counsel for the debtor agreed to make an immediate interest payment of 1½ percent, for the admitted purpose of dissuading the creditor from filing a petition under X. The creditor consented, the court approved, and the XI proceedings were continued.

Since the district court, though questioning the success of this proceeding felt, nevertheless, that it must let it go on to its doubtful conclusion, I would return the order denying dismissal and the order of reference for a re-examination of the problem in the light of the principles just stated. Moreover, since these views lead me directly to the conclusion that the S. E. C. has an important public responsibility of which it cannot be relieved merely by the device of initiating a proceeding designed to exclude it, I think the court exercised a wise and sound discretion in authorizing the Commission to intervene. The cases cited

⁵ For a discussion of the applicability of the Boyd case to Chapter XI, see 48 Yale L. J. 1334, 1357-1362.

⁶ The Boyd case will not prevent successful arrangements under XI in corporate situations where creditors can maintain the business as a going concern only by conceding the preservation of existing stock interests. This will be the case, and XI will be appropriate in every small commercial enterprise where management and stock are identical: it will be less and less the case, and XI will be inappropriate, as the particular business is larger and management and the ownership of stock become the functions of different people.

the opinion to the contrary seem to me merely to support a conclusion from an accepted premise, not to demonstrate the soundness of the premise. Under the view of the Commission's public obligations which I have suggested, cases such as *Pennsylvania v. Williams*, 326 U. S. 176, and *Gordon v. Ominsky*, 294 U. S. 186, afford direct support of the order below.

Moreover, my brothers have limited their search to one for an absolute right of statutory intervention and overlook the provisions for permissive intervention in the discretion of the court, which is an important and salutary feature of the new procedure. The criticisms in the opinion to Professor Moore's treatise on Federal Practice (2 Moore's Federal Practice 2307, 2327) are limited to those discussing either past history or the absolute right and overlook the apposite material showing the power of the court to act when the intervenor presents a claim or defense which has a question of law or fact in common with the main action and the desirability of such action when thereby important questions will be authoritatively adjudicated and further litigation avoided. 2 Moore's Federal Practice 2331-3, 2350-66; *Levi and Moore, Federal Intervention*, 45 *L. J.* 565; *Federal Rule 24 (b) (2)*. I have stated elsewhere my concern at what seems to me undue limitation of these wise provisions. *Commercial Cable Staffs' Asso. v. Lehman*, 107 F. 2d. See 49 *Yale L. J.* 590, 593-4. Here are important questions, the ultimate decision of which cannot be avoided. Here and now is an appropriate occasion for their disposition.

The final question, whether the Commission may appeal, seems to me more difficult. The curiously truncated privilege of intervention without the privilege of appeal, given the Commission in *Chapman v. United States*, 325 U. S. 208, suggests a like limitation here. Why this unusual restriction on intervention was adopted may not be altogether clear; it seems designed to emphasize the ultimate judicial character of corporate reorganization. So the Commission must place its reliance on a plan before the court, but the action to be taken thereon is left to the court's judicial responsibility entirely. When the Commission intervenes to point out that an arrangement cannot be substituted for the proposed reorganization, a similar restriction on the right of appeal may be imposed. Here, however, the intervention was for another purpose, the settling of a vital point of statutory construction, something which cannot be accomplished without appeal. Since the Federal rules of intervention do not prohibit appeal, the court's order allowing appeal for a specific purpose seems not unreasonable.

Since the district court allowed intervention for the one purpose of testing the court's jurisdiction in the light of the statute, the order of reversal here, strictly speaking, may not prevent intervention on the issue of feasibility of a proposed arrangement. But the language of the opinion goes to the extent of such a prohibition, in effect prohibiting any action by the Commission so long as the corporation maintains the section of an XI proceeding. This I deplore. It

renders the Commission impotent for the public interest in a large class of cases and goes far to render abortive what might have proved one of the most important corporate reforms of modern times.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February one thousand nine hundred and forty.

Present: HON. THOMAS W. SWAN, HON. AUGUSTUS N. HAND, HON. CHARLES E. CLARK, Circuit Judges.

IN THE MATTER OF UNITED STATES REALTY AND IMPROVEMENT CO.,
DEBTOR-APPELLANT, SECURITIES AND EXCHANGE COMMISSION, APPELLANT.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of intervention of said District Court be and it hereby is reversed. Further ordered that the appeals of the Securities and Exchange Commission be and hereby are dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, Clerk.

Order for mandate

United States Circuit Court of Appeals, Second Circuit

Filed Feb. 2, 1940—D. E. Roberts, Clerk.

United States of America, Southern District of New York

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 444, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of United States Realty and Improvement Co., Debtor-Appellant, Securities and Exchange Commission, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighth day of February, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

[SEAL]

D. E. ROBERTS, Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed April 1, 1940

the petition herein for a writ of certiorari to the United States
it Court of Appeals for the Second Circuit is granted.
and it is further ordered that the duly certified copy of the
script of the proceedings below which accompanied the petition
be treated as though filed in response to such writ.